

St. John's Law Review

Volume 72
Number 3 *Volume 72, Summer-Fall 1998,*
Numbers 3-4

Article 10

March 2012

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Recommended Citation

Saltzburg, Stephen A. (1998) "Terry v. Ohio: A Practically Perfect Doctrine," *St. John's Law Review*. Vol. 72 : No. 3 , Article 10.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol72/iss3/10>

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TERRY V. OHIO: A PRACTICALLY PERFECT DOCTRINE

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I. INTRODUCTION

Thirty years ago the Supreme Court announced its 8-1 decision in *Terry v. Ohio*,¹ and placed its imprimatur on forcible police encounters with citizens when police lack both probable cause and a warrant. We have now had three decades of experience with *Terry*, and this is more than enough time to assess how well the decision has worked to guide law enforcement officers as to what is permissible and what is not, and also to protect the legitimate privacy rights of citizens.

Chief Justice Earl Warren assigned the *Terry* case to himself. It is apparent from the way the opinion is written that he knew the case was important. Chief Justice Warren left the Court not long after he wrote *Terry*,² and we do not know what more he would have had to say about stop and frisk or whether he would have approved of how the *Terry* case would be used over time. Chief Justice Warren was looking forward as he wrote *Terry*. We are looking backward as we review the decision. We can ask ourselves how prescient the Chief Justice was and how well his approach has stood the test of time.

My thesis is rather simple and straightforward. It has four

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¹ 392 U.S. 1 (1968). Justice Douglas was the sole dissenter. See *id.* at 35. Justice Black concurred in the judgment and the opinion except to the extent that Chief Justice Warren relied on *Katz v. United States*, 389 U.S. 347 (1967), and the concurring opinion of Justice Fortas in *Warden v. Hayden*, 387 U.S. 294, 310 (1967). See *id.* at 31. Justice Harlan filed a concurring opinion, which is discussed below. See *infra* text accompanying notes 90-97. Justice White also filed a two paragraph concurring opinion which is discussed below, together with Justice Harlan's concurrence. See *infra* text accompanying notes 98-101.

² Chief Justice Warren retired from the Supreme Court in 1969. See Editorial, N.Y. TIMES, June 23, 1969, at 38.

prongs. First, *Terry* itself failed to provide a clear enough yardstick for law enforcement, and without further elaboration by the Supreme Court, the doctrine might have become unworkable. Second, subsequent Supreme Court elaborations on *Terry* have developed a standard that is as clear as most Fourth Amendment standards can be and that is adequate to distinguish permissible from impermissible law enforcement confrontations with citizens, at least as far as stops are concerned. In fact, the results reached under *Terry* are practical, reasonable and defensible. They are practically as perfect as we are likely to get. Third, the extension of *Terry* to a number of different situations that are analogous to stops has been, for the most part, logical and defensible. Fourth, the aspect of *Terry* that is most problematic and that requires a more subtle approach than the Court has offered thus far is "the frisk."

In order for me to develop these points, I want to return to the facts of *Terry* and its companion cases, and to the way the Court framed the issue before it. It is important to know the nature of the police activity and the choices that the Court examined in its landmark decision.

II. RETURNING TO *TERRY*

A. *The Facts*

A veteran Cleveland police detective, Martin McFadden, whose name would become a staple in all criminal procedure casebooks that were first born from the many criminal procedure decisions of the Warren Court, was patrolling downtown in plain clothes when he saw John Terry and Richard Chilton standing on a street corner.³ Terry and Chilton were strangers to McFadden, who had patrolled this vicinity of Cleveland for 30 of his 39 years as a police officer.⁴ McFadden's principal assignment was to patrol for shoplifters and pickpockets, but he had developed

³ See *Terry*, 392 U.S. at 5. This fact, like the other facts before the Court in *Terry*, was developed at a suppression hearing in an Ohio state court. I assume that the testimony given by Detective McFadden was accurate, and I rely on Chief Justice Warren's summary of the testimony in his *Terry* opinion. See *id.* I do point out, however, some inconsistencies between the Ohio Court of Appeals's statement of facts and the Chief Justice's. See *State v. Terry*, 214 N.E.2d 114, 116 (Ohio Ct. App. 1966), *aff'd*, 392 U.S. 1 (1968). See *infra* notes 11, 18, and 21 for discussions on these inconsistencies.

⁴ See *Terry*, 392 U.S. at 5.

"habits of observation" which resulted in his paying careful attention to people he observed while on duty.⁵ According to McFadden, when he looked at Terry and Chilton, "they didn't look right to me at the time."⁶

Once he decided that the two men did not look right to him, McFadden took no action to interfere with the men's freedom of movement. Instead, McFadden decided to continue to observe them.⁷ He saw them take turns walking from the corner a short distance to a store window, pause in front of the window, and then return to the corner where they would confer together.⁸ McFadden saw them do this perhaps a dozen times in total before a third man, Carl Katz,⁹ unknown to McFadden, approached Terry and Chilton on the corner and engaged them in conversation.¹⁰ Katz left, and Terry and Chilton resumed their pattern of taking turns walking to the store and back described above for 10 or 12 minutes.¹¹

Detective McFadden became "thoroughly suspicious" at the pattern he observed, because it appeared to him that Terry and Chilton might be "casing a job, a stick-up."¹² But, he took no action to intercept the men, to reveal that he was a police officer, or to move closer to them while they were walking to and from the store until the two men walked away from the corner in the same direction Katz had gone.¹³

Although the men were no longer "casing" the store, McFadden concluded that it was his duty to investigate the men and developed a fear that they might be armed.¹⁴ He followed the

⁵ *Id.*

⁶ *Id.* (quoting McFadden's testimony).

⁷ *See id.* at 6.

⁸ *See id.*

⁹ *See id.* at 7.

¹⁰ *See id.* at 6-7.

¹¹ *See id.* Although Chief Justice Warren writes as though the 10 to 12 minute observation period occurred after the men visited on the corner with Katz, the opinion of the Ohio Court of Appeals in *State v. Terry* indicates that the state court believed that the total time Detective McFadden spent observing Terry and Chilton, both before and after Katz appeared, was 10 to 12 minutes. *See State v. Terry*, 214 N.E.2d 114, 116 (Ohio Ct. App. 1966), *aff'd*, 392 U.S. 1 (1968). It appears from the portion of McFadden's testimony quoted by the Court of Appeals that its analysis is correct. *See id.* at 119 ("Q. You observed these men for some ten to twelve minutes?" "A. That's right.").

¹² *Terry*, 392 U.S. at 6 (quoting McFadden's testimony).

¹³ *See id.* at 6-7.

¹⁴ *See id.* at 6.

pair and saw them stop in front of a store to talk with Katz.¹⁵ McFadden, with no information about any of the three, other than what he had observed, approached the group, identified himself as a police officer, and asked for their names.¹⁶ They mumbled something in response, but did nothing to resist or avoid McFadden. McFadden grabbed Terry, spun him so that he and Terry were facing Chilton and Katz, and moved Terry in front of him so that he could frisk him while observing the others.¹⁷ Feeling a pistol, McFadden unsuccessfully attempted to remove it from Terry, and ordered the three men into the store.¹⁸ McFadden then removed Terry's coat, took a pistol from it, and ordered the three men to face the wall with their hands raised so that he could pat them down. He felt a gun in Chilton's overcoat and removed it, but discovered nothing that felt like a weapon as he patted the outer clothing of Katz. McFadden took all three men to the police station, but only Chilton and Terry were charged, both with carrying concealed weapons.¹⁹

B. The State Court Legal Proceedings

Terry and Chilton not only looked in store windows and carried guns together, but they shared the same attorney, and made a joint motion in the Court of Common Pleas of Cuyahoga County to suppress the guns seized by Detective McFadden.²⁰ The prosecution argued that McFadden had lawfully arrested Terry and Chilton and had seized the guns in a search incident to arrest.²¹ The Ohio trial judge rejected the argument and con-

¹⁵ *See id.*

¹⁶ *See id.* at 6-7.

¹⁷ *See id.*

¹⁸ *See id.* This is Chief Justice Warren's statement of the facts. The Ohio Court of Appeals found that McFadden removed Terry's gun before ordering the three men into the store. *See State v. Terry*, 214 N.E.2d 114, 116 (Ohio Ct. App. 1966), *aff'd*, 392 U.S. 1 (1968).

¹⁹ *See Terry*, 392 U.S. at 6-7. Chief Justice Warren does not explain why Katz was taken to the police station. He might well have been detained as a material witness, since McFadden did not know him and he was a witness to the weapons offenses.

²⁰ *See id.* at 5 n.2; 214 N.E.2d at 116.

²¹ *See Terry*, 392 U.S. at 7. The prosecutor might have felt constrained to make this argument, because Detective McFadden, after moving the three men into the store, told the store clerk to "call the wagon" before he had pat down Chilton. *Terry*, 214 N.E.2d at 116. But, since the Ohio Court of Appeals found that McFadden had found the weapon on Terry and removed it before ordering the three men into the store, the command to the clerk could have been explained as McFadden

cluded that McFadden had no probable cause to arrest the two prior to patting them down.²² The judge reasoned, however, that McFadden "had reasonable cause to believe . . . that the defendants were conducting themselves suspiciously, and some interrogation should be made of their action."²³ The judge distinguished between an investigatory stop and an arrest, and between a frisk and a search for evidence of crime, and upheld Detective McFadden's actions.²⁴ Terry and Chilton, ever the pair, stipulated that evidence would be taken against Chilton and would be applied to Terry.²⁵ McFadden and Chilton testified, and the trial judge simultaneously rendered decisions that Chilton and Terry were both guilty.²⁶

Despite their lack of success as joint clients, Terry and Chilton prosecuted their state court appeals together, and actually filed together a certiorari petition in the United States Supreme Court.²⁷ But for the fact that Chilton died after the Court granted review,²⁸ *Terry v. Ohio* might have been captioned *Chilton v. Ohio*.

The Ohio Court of Appeals wrote that "[t]he right of the proper authorities to stop and question persons in suspicious circumstances has its roots in early English practice where it was approved by the courts and the common-law commentators."²⁹ The court noted also that "[t]oday, in several states, the authority of police officers to detain suspects for a reasonable time for questioning is granted by statute," or "is recognized by court decisions."³⁰ The court recognized that neither the United States Supreme Court nor the courts of Ohio had decided whether a police officer may stop and question suspicious persons, and concluded in a case of first impression that "the better view seems to

having decided that, at a minimum, he was going to arrest Terry on the gun charge. See *id.*

²² See *Terry*, 392 U.S. at 7-8.

²³ *Id.* at 8 (quoting the trial court record) (omission in original).

²⁴ See *id.*

²⁵ See *id.* at 5 n.2.

²⁶ See *id.*

²⁷ See *id.*

²⁸ See *id.*

²⁹ 214 N.E.2d at 117 (citing, inter alia, 2 HAWKINS, PLEAS OF THE CROWN 122, 129 (6th ed. 1777); 2 HALE, PLEAS OF THE CROWN 89, 96-97 (Amer. ed. 1847)).

³⁰ *Id.* (citing, inter alia, N.Y. CODE CRIM. PROC. § 180-a (1964) (current version at N.Y. CRIM. PROC. LAW § 140.50 (McKinney 1992)); *People v. Rivera*, 201 N.E.2d 32 (N.Y. 1960)).

be that the stopping and questioning of suspicious persons is not prohibited by the Constitution."³¹

The Ohio Court of Appeals reasoned that Detective McFadden had no intent to arrest anyone when he first encountered the trio in front of the store, and that he intended "only to inquire as to the defendant's activities."³² The court found that McFadden's arrest of Terry occurred after McFadden discovered the gun on him.³³ The court approved the investigatory stop as a procedure that fell short of arrest.³⁴

After determining that Detective McFadden could lawfully investigate Terry and the others, the Ohio Court of Appeals reasoned that "it follows that the officer ought to be allowed to 'frisk,' under some circumstances at least, to insure that the suspect does not possess a dangerous weapon which would put the safety of the officer in peril."³⁵ The court asked two questions: "What is the officer to do in this situation?" and "Are we to allow him the right of inquiry and then, when this right is exercised, reward him with an assailant's bullet?"³⁶ The court's answer was that "[t]he practice of 'frisking' is well accepted in police practice, and police officers seem unanimous in stating that 'frisking' is done for self-protection and not as a mere evidentiary 'fishing expedition.'"³⁷ The court was careful to distinguish a frisk for dangerous weapons from a "search for contraband, evidentiary material, or anything else in the absence of reasonable grounds to arrest."³⁸ Thus, the court upheld Detective McFadden's frisk for dangerous weapons.³⁹

³¹ *Id.* at 118.

³² *Id.* at 119.

³³ *See id.* at 121.

³⁴ *See id.* at 118-21.

³⁵ *Id.* at 120.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ The Ohio Court of Appeals appears to have had some concern that the United States Supreme Court might not share its view of the need for police officers to investigate and to protect themselves. The court ends its opinion with a reference to *Mapp v. Ohio*, 367 U.S. 643 (1961), another well-known case in which the United States Supreme Court overturned Ohio's approach to the Fourth Amendment. One can readily understand the state court's sensitivity here, since the exclusionary rule was imposed on Ohio and all other states in *Mapp*, notwithstanding the fact that the exclusionary rule was not the subject of briefing and argument in *Mapp*. *See* STEPHEN A. SALTZBURG & DANIEL J. CAPRA, *AMERICAN CRIMINAL PROCEDURE* 383 (5th ed. 1996). The Ohio Court of Appeals stated that the exclusionary rule should

Having approved the investigatory stop and the frisk, the Ohio Court of Appeals had no difficulty concluding that once McFadden found the gun, he had probable cause to arrest Terry.⁴⁰ Thus, the court concluded that the evidence had been obtained in conformity with the Constitution, and it affirmed the judgment of the Common Pleas Court. The Supreme Court of Ohio dismissed the appeals of Terry and Chilton "on the ground that no 'substantial constitutional question' was involved."⁴¹ In so doing, the Ohio Supreme Court removed itself from the discussion of stops and frisks.

Taking a very different view of the substantiality of the constitutional questions raised in the case, the United States Supreme Court granted certiorari to Terry and Chilton.⁴² The Court was poised to address head on a subject that it had not previously confronted. Before granting discretionary review in *Terry*, the Court had noted probable jurisdiction in two New York State cases—*People v. Sibron*,⁴³ and *People v. Peters*⁴⁴—which challenged a New York statute that specifically dealt with stop and frisk. For reasons that will become apparent, the Supreme Court chose *Terry* as the case to announce its approach to forcible police encounters with citizens short of probable cause, and avoided dealing with the New York statute.

C. The Supreme Court's Reasoning

The first sentence of Chief Justice Warren's opinion in *Terry* is as follows: "This case presents serious questions concerning

not suppress weapons obtained in a frisk, because the rule would have no deterrent effect, "as police 'frisk' for their own protection rather than for the purpose of looking for evidence." *State v. Terry*, 214 N.E.2d 114, 121 (Ohio Ct. App. 1966), *aff'd*, 392 U.S. 1 (1968). The court also suggested that, even if the Supreme Court would not approve inquiries into suspicious activities and frisks by federal officers, "[l]ocal problems of law enforcement are quite different from federal problems, and the range of crimes encompassed by the states' jurisdiction creates more complicated patterns to be dealt with." *Id.* The court ended its opinion as follows: "The necessities of law enforcement in large urban areas require the procedures utilized in the instant case. We agree with the District of Columbia Court of Appeals when it stated that it cannot believe that the 'Supreme Court has forbidden the police to investigate crime.'" *Id.* at 122 (quoting *Trilling v. United States*, 260 F.2d 677, 700 (D.C. Cir. 1958)).

⁴⁰ See *Terry*, 214 N.E.2d at 121.

⁴¹ *Terry v. Ohio*, 392 U.S. 1, 8 (1968).

⁴² See *Terry v. Ohio*, 387 U.S. 929 (1967).

⁴³ 219 N.E.2d 196 (N.Y. 1966), *prob. juris. noted*, 386 U.S. 954 (1967).

⁴⁴ 219 N.E.2d 595 (N.Y. 1966), *prob. juris. noted*, 386 U.S. 980 (1967).

the role of the Fourth Amendment in the confrontation on the street between the citizen and the policeman investigating suspicious circumstances."⁴⁵ Only after so describing the case did the Chief Justice state the facts and the procedural history. Like the Ohio Court of Appeals, the Chief Justice began the legal analysis in his opinion by observing that the questions raised involved "issues which have never before been squarely presented to this Court."⁴⁶

Part I of the Chief Justice's legal analysis describes two competing arguments. The first is the argument for a stop and frisk rule:

On the one hand, it is frequently argued that in dealing with the rapidly unfolding and often dangerous situations on city streets the police are in need of an escalating set of flexible responses, graduated in relation to the amount of information they possess. For this purpose it is urged that distinctions should be made between a "stop" and an "arrest" (or a "seizure" of a person), and between a "frisk" and a "search." Thus, it is argued, the police should be allowed to "stop" a person and detain him briefly for questioning upon suspicion that he may be connected with criminal activity. Upon suspicion that the person may be armed, the police should have the power to "frisk" him for weapons. . . . This scheme is justified in part upon the notion that a "stop" and a "frisk" amount to a mere "minor inconvenience and petty indignity,"⁴⁷ which can properly be imposed upon the citizen in the interest of effective law enforcement on the basis of a police officer's suspicion.⁴⁸

The Chief Justice then turned to the competing argument which interpreted the Fourth Amendment as providing much less flexibility for police doing street work:

On the other side the argument is made that the authority of the police must be strictly circumscribed by the law

⁴⁵ *Terry*, 392 U.S. at 4.

⁴⁶ *Id.* at 9-10.

⁴⁷ Footnote 4 of the Chief Justice's opinion cited *People v. Rivera*, 201 N.E.2d 32, 36 (N.Y. 1964) for this proposition. *See id.* at 10 n.4. *Rivera* was relied upon by the New York Court of Appeals in *Sibron* and *Peters*, the companion cases.

⁴⁸ *Id.* at 10-11 (footnotes omitted). The Chief Justice again cited the *Rivera* case, where the New York Court of Appeals stated that, since the stopping and frisking of an individual is not an arrest, some grounds less than that required for an arrest may be used. *See id.* (citing *Rivera*, 201 N.E.2d at 35).

of arrest and search as it has developed to date in the traditional jurisprudence of the Fourth Amendment. It is contended with some force that there is not—and cannot be—a variety of police activity which does not depend solely upon the voluntary cooperation of the citizen and yet which stops short of an arrest based upon probable cause to make such an arrest. . . . Acquiescence by the courts in the compulsion inherent in the field interrogation practices at issue here, it is urged, would constitute an abdication of judicial control over, and indeed an encouragement of, substantial interference with liberty and personal security by police officers whose judgment is necessarily colored by their primary involvement in “the often competitive enterprise of ferreting out crime.” This, it is argued, can only serve to exacerbate police-community tensions in the crowded centers of our Nation’s cities.⁴⁹

Having set forth these competing arguments, the Chief Justice observed that Ohio’s argument that the issue before the Court is simply whether a police officer may make an on-the-street stop for purposes of interrogation “is only partly accurate,”⁵⁰ because the Court was asked to rule on the admissibility of evidence and to employ the exclusionary rule, which meant that its ruling would either legitimate or condemn police conduct.⁵¹ The opinion then digressed into an analysis of the limits of the exclusionary rule as a device to control behavior. Chief Justice Warren made three distinct points regarding the exclusionary rule, recognizing that: (1) “Regardless of how effective the rule may be where obtaining convictions is an important objective of the police, it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal;”⁵² (2) “The wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence

⁴⁹ *Id.* at 11-12 (footnote omitted) (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)).

⁵⁰ *Id.* at 12.

⁵¹ *See id.* at 13.

⁵² *Id.* at 14 (footnote omitted).

from any criminal trial",⁵³ and (3) "[A] rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime."⁵⁴

I say that this is a digression, because it has nothing to do with the facts observed by Officer McFadden or with his principal duties as a plain-clothes detective, which were to observe crime, stop it, arrest wrongdoers, and see that they were prosecuted and convicted. It may well be that this part of the opinion represents the Court's response to the Ohio Court of Appeals' opinion suggesting that the exclusionary rule could easily be overused and its concern that the United States Supreme Court may not understand the protean variety of street encounters with which local police must deal on a regular basis. Whether this is the correct explanation is less important than Chief Justice Warren's recognition that he had digressed, for he concluded Part I of his legal analysis with a paragraph stating that he had "roughly sketched the perimeters of the constitutional debate over the limits on police investigative conduct in general" and the Court would now "turn our attention to the quite narrow question posed by the facts before us: Whether it is always unreasonable for a policeman to seize a person and subject him to a limited search for weapons unless there is probable cause for an arrest."⁵⁵ Chief Justice Warren limited the opinion to this narrow question and explicitly stated that "we have no occasion to canvass in detail the constitutional limitations upon the scope of a policeman's power when he confronts a citizen without probable cause to arrest him."⁵⁶

In Part II of his legal analysis, the Chief Justice rejected the argument that the Fourth Amendment is not implicated by a "stop" or a "frisk" because the former is not a seizure and the latter is not a search:

It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person. And it is nothing less than sheer torture of the English language to suggest that

⁵³ *Id.* at 14-15 (footnote omitted).

⁵⁴ *Id.* at 15.

⁵⁵ *Id.*

⁵⁶ *Id.* at 16.

a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a "search."⁵⁷

Thus, the Court had no question that Detective McFadden seized Terry and searched him within the meaning of the Fourth Amendment.⁵⁸ In so holding, the Court declined to isolate stops and frisks from constitutional scrutiny and to adopt "a rigid all-or-nothing model of justification and regulation," in which the Fourth Amendment either applied fully and completely to all conduct in a uniform way or it did not apply at all.⁵⁹ Instead, the Court turned to an analysis of whether Detective McFadden's search and seizure of Terry "was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place."⁶⁰

The Chief Justice observed in Part III of his legal analysis that this case involved the kind of police conduct based upon on-the-spot observations which as a practical matter could not be subjected to the warrant requirement of the Fourth Amendment.⁶¹ He also recognized, albeit less explicitly, that the kind of decision McFadden was called upon to make would often be based upon less than probable cause.⁶² However, the Chief Justice stated that the notions underlying both the warrant and probable cause requirement were relevant to establishing the standard under which McFadden's conduct would be analyzed, since the governmental interest at stake must be part of a reasonableness inquiry as the personal interest in avoiding invasions of privacy must also be.⁶³ With respect to the governmental

⁵⁷ *Id.*

⁵⁸ *See id.* at 19.

⁵⁹ *Id.* at 17. The Chief Justice criticized the New York Court of Appeals's decision in *People v. Rivera*, and subsequent cases relying on that decision. He reasoned that the Court of Appeals had drawn too sharp a distinction between seizures and stops and searches and frisks, and stated:

In our view the sounder course is to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, in light of all the exigencies of the case, a central element in the analysis of reasonableness.

Id. at 18 n.15.

⁶⁰ *Id.* at 20.

⁶¹ *See id.* Instead, the Court notes that the actions here must be analyzed against the Fourth Amendment's prohibitions against unreasonable searches and seizures. *See id.*

⁶² *See id.* at 22.

⁶³ *See id.* at 20-21.

interest, the Chief Justice wrote that "in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."⁶⁴

Chief Justice Warren identified the governmental interest in *Terry* as effective crime prevention and detection, an interest that justifies a police officer in investigating possible criminal behavior even though he lacks probable cause.⁶⁵ After reiterating what McFadden had observed, Chief Justice Warren concluded that "[i]t would have been poor police work indeed for an officer of 30 years' experience in the detection of thievery from stores in this same neighborhood to have failed to investigate this behavior further."⁶⁶

It is most interesting that the Chief Justice moved from this observation to what he regarded as "[t]he crux of this case."⁶⁷ For him, this was "not the propriety of Officer McFadden's taking steps to investigate petitioner's suspicious behavior"; it was "whether there was justification for McFadden's invasion of Terry's personal security by searching him for weapons in the course of that investigation."⁶⁸ This analysis virtually ignored the potential "stop" aspect of the case, which occurred when McFadden approached Terry, Chilton and Katz, identified himself as a police officer and asked for identification. Were they free to leave? Was this a seizure? The Court neither asked nor answered these questions. Instead, it jumped from McFadden's investigation by observation to his frisk.

Once the jump was made, the Chief Justice cited data on the dangers to law enforcement officials and wrote:

When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a

⁶⁴ *Id.* at 21. The Chief Justice stated that "[t]his demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." *Id.* at 21 n.18. Thus, the phrase "specific and articulable facts" would be an important part of a stop and frisk analysis.

⁶⁵ *See id.* at 22.

⁶⁶ *Id.* at 23.

⁶⁷ *Id.*

⁶⁸ *Id.*

weapon and to neutralize the threat of physical harm.⁶⁹

At this point in his opinion, the Chief Justice confronted another all-or-nothing argument; this one raised by Terry. Terry argued that a police officer should not be permitted to search for weapons until there is probable cause for arrest; a frisk is a search and a search always requires probable cause.⁷⁰ In response, Chief Justice Warren reasoned that the argument failed to consider the different purposes, character and extent of a search incident to an arrest and a weapons frisk, and it also failed to recognize that danger to police officers may arise before probable cause exists to arrest.⁷¹ The Chief Justice announced the Court's standard for frisks not based upon probable cause:

Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or "hunch," but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.⁷²

Chief Justice Warren turned in Part IV of his legal analysis to examine the conduct of Detective McFadden, and offered the bottom line: "We think on the facts and circumstances Officer McFadden detailed before the trial judge a reasonably prudent man would have been warranted in believing petitioner was armed and thus presented a threat to the officer's safety while

⁶⁹ *Id.* at 24. The Court noted that 57 law enforcement officers were killed in the line of duty, 41 of which died from handguns hidden on the assailant, and 9,113 officers were injured as the result of 23,851 assaults in 1966. *See id.* at 24 n.21 (citing FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES 1966, at 45-48, 152).

⁷⁰ *See id.* at 25.

⁷¹ *See id.* at 25-27.

⁷² *Id.* at 27 (citations omitted).

he was investigating his suspicious behavior.”⁷³ As the Chief Justice saw it, McFadden hypothesized that Terry and Chilton were contemplating a daylight robbery; based upon this hypothesis, McFadden reasonably assumed that the robbery would involve the use of weapons, and nothing in his investigation gave McFadden sufficient reason to abandon his hypothesis.⁷⁴ The Chief Justice concluded that the Court could not say that McFadden’s decision to “seize Terry and pat his clothing for weapons was the product of a volatile or inventive imagination, or was undertaken simply as an act of harassment.”⁷⁵ Instead, the Court saw a veteran police officer who made a quick decision to protect himself and others from danger.⁷⁶

The Chief Justice focused on the manner in which the seizure and search took place and declined to “develop at length in this case . . . the limitations which the Fourth Amendment places upon a protective seizure and search for weapons.”⁷⁷ The Court said it would “[s]uffice it to note that such a search, unlike a search without a warrant incident to a lawful arrest, is not justified by any need to prevent the disappearance or destruction of evidence of crime,” and emphasized that “[t]he sole justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.”⁷⁸ McFadden’s pat down of Terry satisfied the Court, because it was limited to discovering weapons and was not a general exploratory search for evidence.⁷⁹

In Part V of his legal analysis, the Chief Justice reiterated in a paragraph what was stated in the first four parts. He emphasized that “[e]ach case of this sort will, of course, have to be decided on its own facts.”⁸⁰ He then repeated the holding of the

⁷³ *Id.* at 28.

⁷⁴ *See id.*

⁷⁵ *Id.*

⁷⁶ *See id.* (characterizing the officer’s “limited steps” to protect himself and others).

⁷⁷ *Id.* at 28-29.

⁷⁸ *Id.*

⁷⁹ *See id.* at 29-30 (reasoning that the officer did not place his hands inside Terry or Chilton’s pockets until he felt their weapons during the pat down, never searched the third man beyond the pat down and “confined his search strictly to what was minimally necessary”).

⁸⁰ *Id.* at 30.

Court:

We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.⁸¹

D. The Limits of the Warren Opinion

Chief Justice Warren's legal analysis began with an examination of the exclusionary rule and a discussion of searches and seizures⁸² and arguments that stops and frisks were not really searches and seizures.⁸³ As his analysis proceeded, it became narrower and narrower until it ended with the limited holding quoted immediately above. Indeed, if the limited holding is parsed, the Court would appear to have decided little and to have left most issues open for future cases. If one takes the Chief Justice at his word, the Court decided only as follows:

1. A police officer who "observes *unusual* conduct,"
2. and who *reasonably* concludes,
3. based on the officer's experience,
4. that "criminal activity may be afoot,"
5. and that persons may be "armed and *presently* dangerous,"
6. and the officer identifies himself as a police officer,
7. and makes "*reasonable* inquiries,"
8. and nothing dispels the officer's fear for his or others' safety—then
9. the officer may "conduct a *carefully limited* search of the *outer clothing*,"
10. in an attempt "to discover weapons which might be used

⁸¹ *Id.*

⁸² *See id.* at 12-15.

⁸³ *See id.* at 16-17.

to assault the officer."⁸⁴

Such a holding provides virtually no guidance to either the police or the public as to what a police officer may do when confronting suspicious behavior. Notwithstanding the fact that *Terry* is widely known today as a reasonable suspicion case and as establishing a reasonable suspicion standard, one can find nothing in Chief Justice Warren's opinion to support the claim that he thought that was the standard the Court was adopting. Once we look at the companion cases to *Terry*, we will understand a little better why the Chief Justice wrote as narrowly as he did.

E. The Breadth of the Opinion

Despite the narrowness of the Court's holding, there are aspects of *Terry* that suggest the Court was quite aware of and sympathetic to the difficulties that law enforcement officers face when they are called upon to make split-second decisions.⁸⁵ It is notable, for example, that the Court never mentions what kind of store *Terry* and *Chilton* were casing as *McFadden* watched them.⁸⁶ The failure to make any mention must have meant that, for the Court, the type of store was not very important. A review of the Ohio Court of Appeal's decision reveals that it was either an airline office or a jewelry store.⁸⁷ It is not difficult to imagine an opinion that would give some weight to the supposed target of an armed robbery in assessing the reasonableness of the police officer's judgment that two strangers were actually casing a store with an eye to robbing it. The Court's inattention to the store represents respect for the street officer's judgment that an armed robbery of any store which has cash or valuables is possible.

Perhaps more significant is the failure of the Chief Justice even to mention the most obvious problem with the judgment that Detective *McFadden* made, i.e., *Terry* and *Chilton* had walked away from the store and the window into which they had

⁸⁴ *Id.* at 30 (emphasis added).

⁸⁵ *See id.* at 13 (noting that such encounters may be "wholly friendly," "hostile confrontations" or those that "take a different turn upon the injection of some unexpected element into the conversation").

⁸⁶ *See id.* at 6.

⁸⁷ *See State v. Terry*, 214 N.E.2d 114, 116 (Ohio Ct. App. 1966), *aff'd* 392 U.S. 1 (1968).

gazed so many times.⁸⁸ By walking away, they might well have signaled their decision not to engage in any criminal act, and they surely might have signaled that they were no *present* threat to anyone. The Chief Justice's decision to ignore their movement away from the target store is another example of deference to the experience and judgment of the street officer. The Chief Justice understood that Detective McFadden and others like him could not be present indefinitely in front of a single store, if they were to do their jobs, and they must sometimes act when criminal activity may be "afoot" or lurking.⁸⁹ Thus, *Terry's* holding, as limited as it purported to be, was adopted against a factual backdrop in which the Court was not very concerned about the nature of the target or the actual likelihood of imminent criminal action.

F. Justice Harlan's Concurrence

Justice Harlan's concurrence plainly recognized that the *Terry* language would serve as "initial guidelines for law enforcement authorities and courts throughout the land as this important new field of law develops."⁹⁰ Agreeing completely with all that the Chief Justice said about stops and frisks being bounded by the Fourth Amendment, Justice Harlan wrote that "[i]f the State of Ohio were to provide that police officers could, on articulable suspicion less than probable cause, forcibly frisk and disarm persons thought to be carrying concealed weapons, I would have little doubt that action taken pursuant to such authority *could* be constitutionally reasonable."⁹¹ Noting that Ohio had not conferred such authority on its officers, Justice Harlan reasoned that the Ohio courts relied on the necessities of the situation and he agreed with their analysis.⁹²

Justice Harlan explained that "if the frisk is justified in order to protect the officer during an encounter with a citizen, the officer must first have constitutional grounds to insist on an encounter, to make a *forcible* stop,"⁹³ and explicitly declared that "I would make it perfectly clear that the right to frisk in this case

⁸⁸ See *Terry*, 392 U.S. at 6.

⁸⁹ *Id.* at 30.

⁹⁰ *Id.* at 31 (Harlan, J., concurring).

⁹¹ *Id.* (emphasis added). It is worth noting that Justice Harlan said that such action *could* be constitutionally reasonable, not that it *would* be.

⁹² See *id.* at 32.

⁹³ *Id.*

depends upon the reasonableness of a forcible stop to investigate a suspected crime,"⁹⁴ and emphasized that "[w]here such a stop is reasonable . . . the right to frisk must be immediate and automatic if the reason for the stop is, as here, an articulable suspicion of a crime of violence."⁹⁵

Detective McFadden's conduct illustrated, for Justice Harlan, a proper stop and an incidental frisk. Justice Harlan found that McFadden could have reasonably suspected that Terry was about to engage in either a burglary or a robbery.⁹⁶ According to Justice Harlan, his reasonable suspicion amounted to "circumstances [that] warranted forcing an encounter with Terry . . . to prevent or investigate a crime."⁹⁷

G. Justice White's Concurrence

Justice White offered a two-paragraph concurrence, the first of which is a single sentence reserving judgment on some of the Court's comments on the exclusionary rule.⁹⁸ The second paragraph begins with Justice White's offering "an additional word . . . concerning the matter of interrogation during an investigative stop."⁹⁹ Justice White distinguished encounters between police officers and citizens in which citizens are free to leave and may refuse to cooperate from encounters characterized as temporary detentions, and reasoned that "it is temporary detention, warranted by the circumstances, which chiefly justifies the protective frisk for weapons."¹⁰⁰ Justice White reasoned that, whether or not weapons are found, "if the investigative stop is sustainable at all, constitutional rights *are not necessarily violated* if pertinent questions are asked and the person is restrained briefly in the process."¹⁰¹

⁹⁴ *Id.* at 33.

⁹⁵ *Id.*

⁹⁶ *See id.*

⁹⁷ *Id.* at 34.

⁹⁸ *See id.* (White, J., concurring).

⁹⁹ *Id.* (indicating his view that Detective McFadden made an investigative stop in addition to performing a frisk).

¹⁰⁰ *Id.* at 34.

¹⁰¹ *Id.* at 35 (emphasis added) (phrasing his opinion, like Justice Harlan, by choosing words that fell short of a clear announcement that investigatory stops would be upheld, even if reasonable under the circumstances).

H. Justice Douglas's Dissent

Justice Douglas dissented and argued that it was a mystery how the Court could uphold a search and seizure without probable cause to believe that a crime had been committed, was in the process of being committed, or was about to be committed.¹⁰² His principal concern was that, before *Terry*, police were excused from obtaining warrants under various circumstances, but were required to have the same probable cause that a magistrate could require if a warrant were sought.¹⁰³ Interestingly, he complains that "[t]he term 'probable cause' rings a bell of certainty that is not sounded by phrases such as 'reasonable suspicion.'"¹⁰⁴ Since Chief Justice Warren did not hint let alone hold that the Court was adopting a reasonable suspicion standard, Justice Douglas was responding to a standard which was not yet the law but which he undoubtedly foresaw would be. His dissent was more clearly directed to Justice Harlan's concurrence than to the majority's holding, and it may well be that Justice Douglas understood that Justice Harlan's logic could not be denied.

III. THE COMPANION CASES

To understand why Chief Justice Warren attempted to narrow the holding of *Terry*, it is useful to examine the two cases that were argued and decided with *Terry*: *Peters v. New York*, and *Sibron v. New York*.¹⁰⁵ Chief Justice Warren wrote the opinion in these cases as well as *Terry*, and they shed considerable light on the reasons why no clear standard to govern police behavior is set forth in *Terry*. Both of the companion cases "ar[ise] in the context of New York's 'stop and frisk' law, N.Y. Code Crim. Proc. § 180-a."¹⁰⁶ The New York statute contained the following two paragraphs:

1. A police officer may stop any person abroad in a public place whom he reasonably suspects is committing, has committed or is about to commit a felony or any of the crimes specified in section five hundred fifty-two of this chapter, and may demand of him his name, address and an explanation of his actions.

¹⁰² See *id.* at 35 (Douglas, J., dissenting).

¹⁰³ See *id.* at 36-38.

¹⁰⁴ *Id.* at 37.

¹⁰⁵ 392 U.S. 40 (1968).

¹⁰⁶ *Id.* at 43.

2. When a police officer has stopped a person for questioning pursuant to this section and reasonably suspects that he is in danger of life or limb, he may search such person for a dangerous weapon. If the police officer finds such a weapon or any other thing the possession of which may constitute a crime, he may take and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person.¹⁰⁷

A. Peters and Sibron—*The State Court Decisions*

John Peters was convicted of possession of burglar tools after being arrested by Samuel Lasky, an 18-year veteran patrolman with the New York City Police Department.¹⁰⁸ Lasky was home in his top-floor apartment when he heard a noise at his front door and subsequently saw through his peephole two men tiptoeing about the hallway. Lasky phoned the police, returned to his door, and saw the men continue to tiptoe toward the stairway.¹⁰⁹ Gun in hand, Lasky slammed his door, he heard footsteps running down the stairs, and he gave chase. Lasky, who had lived in the apartment for 12 years, caught Peters on the stairway between floors, but did not recognize him, and inquired into Peters's presence in the building.¹¹⁰ Peters claimed that he was looking for a girlfriend whom he would not identify because she was married. Lasky brought Peters to the nearest floor and frisked him for a weapon. Lasky felt something like a knife, withdrew an unsealed opaque envelope from Peters's pants pocket, opened the envelope, and saw burglary tools.¹¹¹

Peters moved to suppress the tools when he was charged with their possession. The state trial judge denied the motion to suppress, after which Peters pled guilty.¹¹² The New York Court of Appeals upheld the conviction by a 5-2 vote.¹¹³

¹⁰⁷ N.Y. CODE CRIM. PROC. § 180-a (1964) (current version at N.Y. CRIM. PROC. LAW § 140.50 (McKinney 1992)).

¹⁰⁸ See *People v. Peters*, 219 N.E.2d 595, 596-97 (N.Y. 1966) (mem.), *aff'd sub nom.*, *Sibron v. New York*, 392 U.S. 40 (1968).

¹⁰⁹ See *id.* at 596.

¹¹⁰ See *id.* at 596-97.

¹¹¹ See *id.*

¹¹² See *id.*

¹¹³ See *id.* at 601-02.

Although the state relied upon the New York statute to defend Lasky's actions,¹¹⁴ the Court of Appeals relied upon its prior decision in *People v. Rivera*,¹¹⁵ and concluded that Lasky's actions were proper even without the statute.¹¹⁶ The Court of Appeals found that the "suspicious circumstances" warranted Lasky's stopping Peters and inquiring as to his presence in the building, because Lasky's actions were supported by reasonable suspicion.¹¹⁷ The Court observed that "[t]he conflict between the desire to be free from any police detention and the long-recognized need for police inquiry must be resolved by striking a fair balance."¹¹⁸ The Court also noted that "[b]y requiring the reasonable suspicion of a police officer, the statute incorporates the experienced police officer's intuitive knowledge and appraisal of the appearances of criminal activity," and "[h]is evaluation of the various factors involved insures a protective, as well as definitive, standard."¹¹⁹

The Court of Appeals also found Lasky's frisk to be reasonable under the circumstances: "[A] single officer collared a single defendant in the . . . confines of a stairway," and "a second suspect [was] still on the loose."¹²⁰ The Court concluded that "[n]ot only was Lasky's frisk legal, it was necessary—it would have been extremely poor police work not to have frisked the defendant in such a situation."¹²¹ Thus, the Court explicitly approved "reasonable suspicion" as a constitutionally adequate standard for a detention for investigation and argued that the standard is "no less endowed with an objective meaning than is the phrase 'probable cause.' " ¹²² The majority predicted that "[c]ourts will have no difficulty in applying this standard and have frequently

¹¹⁴ See *People v. Peters*, 254 N.Y.S.2d 10, 13 (County Ct. 1964), *aff'd*, 265 N.Y.S.2d 612 (App. Div. 1965), *aff'd*, 219 N.E.2d 595 (N.Y. 1966) (mem.), *aff'd sub nom.*, *Sibron v. New York*, 392 U.S. 40 (1968).

¹¹⁵ 201 N.E.2d 32, 36 (1964) (holding that the Fourth Amendment restriction applies only to unreasonable searches, not all searches). As discussed by the New York Court of Appeals in *Peters*, *Rivera* involved three policemen and two suspects on a street at night, where the frisk resulted in the seizure of a weapon. See *Peters*, 219 N.E.2d at 598.

¹¹⁶ See *Peters*, 219 N.E.2d at 597.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 599.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 598.

¹²¹ *Id.* (emphasis omitted).

¹²² *Id.* at 599.

in the past referred to 'suspicion' or 'reasonable suspicion' as terms with a definite meaning, somewhat below probable cause on the scale of absolute knowledge of criminal activity."¹²³

In addition, the Court clarified that a frisk must be justified by reasonable suspicion, and defined a frisk as "the patting of the exterior of one's clothing in order to detect by touch the presence of a concealed weapon."¹²⁴ The Court stated that "[t]he frisk is less such invasion in degree than an initial full search of the person would be,"¹²⁵ and "[w]here . . . circumstances warrant the reasonable officer in suspecting that he is in danger of life or limb, the person may be searched for a dangerous weapon in the least obtrusive manner."¹²⁶

The Court of Appeals defined "probable cause" as requiring "satisfactory grounds for *believing* that a crime was committed" and "reasonable suspicion" as requiring "satisfactory grounds for suspecting that a crime was committed," and suggested that "[t]he difference between these two standards is proportionate to the difference in degree of invasion between an arrest and a detention, between a full search and a frisk."¹²⁷

Judge Fuld and Judge Van Voorhis dissented.¹²⁸ Judge Fuld argued that the statute violated the Fourth Amendment by authorizing a search on less than probable cause.¹²⁹ Judge Van Voorhis relied upon his dissent in *Sibron*, discussed next.¹³⁰

Sibron had been convicted in New York State court of the unlawful possession of heroin.¹³¹ At a suppression hearing, Brooklyn patrolman Anthony Martin testified that he was patrolling his beat in uniform and observed *Sibron* from 4:00 in the afternoon until midnight, and that *Sibron* was in conversation with six to eight people who Martin knew were narcotics addicts. *Sibron* entered a restaurant and spoke with three more known addicts, ordered pie and coffee and was eating when Martin ap-

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* (quoting *People v. Rivera*, 201 N.E.2d 32, 35 (N.Y. 1964)).

¹²⁶ *Id.* at 600.

¹²⁷ *Id.* (stating that such a distinction was "both reasonable and desirable").

¹²⁸ *See id.* at 601-02.

¹²⁹ *See id.* at 601 (Fuld, J., dissenting) (arguing that the Court's interpretation of the New York statute was an "outright invitation to evade the constitutional prohibition against unreasonable searches and to circumvent the exclusionary rule").

¹³⁰ *See id.* at 602 (Van Voorhis, J., dissenting).

¹³¹ *See Sibron v. New York*, 392 U.S. 40, 44 (1968).

proached him and asked him to come outside.¹³² Once outside, Martin said to Sibron, "[y]ou know what I am after."¹³³ Sibron mumbled something and reached into his pocket, and Martin put his own hand into Sibron's pocket and discovered several glassine envelopes containing heroin.¹³⁴ The state trial judge denied a motion to suppress evidence, and the New York Court of Appeals upheld Sibron's conviction by a 5-2 vote, without an opinion by the majority.¹³⁵

One of the dissenting judges in the New York Court of Appeals, Judge Van Voorhis, was willing to assume that Patrolman Martin reasonably suspected that Sibron was committing or about to commit a felony within the meaning of the New York statute.¹³⁶ He found fault, however, in the scope of Martin's search and argued that the statute should be limited to discovery of dangerous weapons concealed upon the person of the suspect in order to protect the safety of the officer.¹³⁷ Thus, Judge Van Voorhis would have strictly circumscribed the scope of a frisk.¹³⁸ Judge Fuld relied upon his dissent in *Peters*.¹³⁹

B. *The New York Court of Appeals' Argument*

Not only did the Court of Appeals uphold the convictions in *Peters* and *Sibron*, but in *Peters* the court stated that Officer Lasky "is deserving of our highest praise."¹⁴⁰ Like Chief Justice Warren who praised Detective McFadden in *Terry*, the Court of Appeals in *Peters* concluded that the officer did exactly what the public wanted an officer to do, and that in the process he protected himself as he well should have.¹⁴¹

The Court of Appeals warned in *Peters* of the consequences of applying a single probable cause standard to all police conduct: "The attempt to apply a single standard of probable cause to all interferences—i.e., to treat a stop as an arrest and a frisk

¹³² See *id.* at 45.

¹³³ *Id.*

¹³⁴ See *id.*

¹³⁵ See *People v. Sibron*, 219 N.E.2d 196 (N.Y. 1966) (mem.), *rev'd*, 392 U.S. 40 (1968).

¹³⁶ See *id.* at 197 (Van Voorhis J., dissenting).

¹³⁷ See *id.*

¹³⁸ See *id.* at 199.

¹³⁹ See *id.* at 197. (Fuld, J., dissenting).

¹⁴⁰ *Peters*, 219 N.E.2d at 599.

¹⁴¹ See *id.*

as a search—produces a standard either so strict that reasonable and necessary police work becomes unlawful or so diluted that the individual is not adequately protected.”¹⁴² The Court went on to conclude that “[t]he doctrine of ‘stop and frisk upon reasonable suspicion’ does not produce unreasonable searches and seizures. It gives effect to the principle that the grounds for a stop should be reasonable in light of the degree of interference it represents.”¹⁴³

C. Supreme Court Review

Peters and *Sibron* are discussed together in a single opinion authored by Chief Justice Warren.¹⁴⁴ The Chief Justice chose to discuss *Sibron* first and *Peters* second.¹⁴⁵

According to the Chief Justice, the state trial judge denied Sibron’s motion to suppress heroin without relying on a stop and frisk analysis.¹⁴⁶ The judge found probable cause for Patrolman Martin to arrest Sibron and to search him incident to arrest.¹⁴⁷ He pointed out, as I have, that the Court of Appeals’ majority wrote no opinion in affirming the conviction.¹⁴⁸ The state relied upon the stop and frisk statute in the Supreme Court, and attempted to confess error after the Court noted probable jurisdiction in the case.¹⁴⁹ Apparently, the state was persuaded that Sibron’s conviction was invalidly obtained and that the search that produced the heroin was illegal. The Supreme Court declined to accept the confession of error, however, and decided to reach the merits.¹⁵⁰

Although the parties in both *Sibron* and *Peters* argued that the Court should address the constitutionality of the New York stop and frisk statute on its face, Chief Justice Warren’s opinion explicitly rejected these arguments on the ground that “[t]he constitutional validity of a warrantless search is pre-eminently the sort of question which can only be decided in the concrete

¹⁴² *Id.* at 600.

¹⁴³ *Id.*

¹⁴⁴ See *Sibron v. New York*, 392 U.S. 40 (1968).

¹⁴⁵ See *id.* at 44.

¹⁴⁶ See *id.* at 47.

¹⁴⁷ See *id.*

¹⁴⁸ See *supra* text accompanying note 135.

¹⁴⁹ See *Sibron*, 392 U.S. at 47-48.

¹⁵⁰ See *id.* at 58-59. Justice Fortas would have accepted the confession of error, as he indicated in his concurring opinion. See *id.* at 70 (Fortas, J., concurring).

factual context of the individual case.”¹⁵¹ Chief Justice Warren observed that the names which New York chose to apply to police conduct would not be determinative of Fourth Amendment validity, nor would the Fourth Amendment issue turn on whether police conduct was authorized by state law. The Chief Justice observed that some stops authorized by statute might not even constitute seizures while others might be justified as arrests, and thus emphasized that a statute on its face may appear to authorize an array of conduct which must be examined on a case by case basis.¹⁵²

Looking at the facts of *Sibron*, the Chief Justice avoided the question whether Sibron had been seized at any point before Patrolman Martin physically grabbed him and reached into his pocket. Thus, the Court avoided having to decide whether there was a reasonable basis for a detention for purposes of investigation based upon Martin’s observations.¹⁵³ Chief Justice Warren leaped beyond the detention issue to criticize the New York Court of Appeals for treating Martin’s search as a self-protective search for weapons.¹⁵⁴ Chief Justice Warren recognized in his opinion that the state trial judge apparently upheld the search as incident to arrest and never reached the question of the applicability of the stop and frisk statute.¹⁵⁵ Ironically, the Chief Justice insisted that the Court of Appeals affirmed on a different basis. This assumption is questionable even though the dissent by Judge Van Voorhis discussed the stop and frisk statute, and stated that the State did not contend on appeal that there was probable cause to make an arrest.¹⁵⁶ It is quite possible that the majority of the Court of Appeals simply affirmed the trial judge’s finding of probable cause, even though this might have been error. Neither Chief Justice Warren nor Judge Van Voorhis disclosed what Sibron’s counsel argued. The other possibility is that counsel failed to raise a specific challenge to the way in

¹⁵¹ *Id.* at 59.

¹⁵² *See id.* at 60 n.20.

¹⁵³ *See id.* at 72 (addressing the stop in his concurring opinion, Justice Harlan concluded that the encounter between Patrolman Martin and Sibron did not meet the *Terry* standard; therefore, there was an absence of reasonable grounds to intrude forcibly upon Sibron).

¹⁵⁴ *See id.* at 63-64 & n.21.

¹⁵⁵ *See id.* at 46-47 n.4, 64 n.21.

¹⁵⁶ *See People v. Sibron*, 219 N.E.2d 196, 197 (N.Y. 1966) (mem.) (Van Voorhis, J., dissenting), *rev’d*, 392 U.S. 40 (1968).

which the New York statute was applied to *Sibron*. These are more than idle possibilities, given the limits that the Court of Appeals placed upon both stops, and especially frisks in *Peters*, as discussed above.

It is relatively easy for the Chief Justice to have concluded that, even assuming that there were adequate grounds for Martin to frisk Sibron, "[t]he search was not reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception—the protection of the officer by disarming a potentially dangerous man."¹⁵⁷ This conclusion is totally consistent both with the New York Court of Appeals' reasoning in *Peters*, and with the State's attempt to confess error in the case.

Justice Black, who agreed with the Court that the state's confession of error should be rejected, argued that "there was probable cause for the policeman to believe that when Sibron reached his hand to his coat pocket, Sibron had a dangerous weapon which he might use if it were not taken away from him."¹⁵⁸ Justice Black appeared to have misunderstood the Chief Justice's reasoning, since Justice Black wrote that the Court seems to have determined that the New York Court of Appeals used this rationale to affirm the conviction and to hold that the officer reasonably suspected he was in danger of life or limb. As explained above, no one can be sure what the Court of Appeals reasoning was, but it is virtually certain that no one argued that Martin had probable cause to arrest Sibron for concealing a dangerous weapon, since that argument is not mentioned anywhere except in Justice Black's opinion and is unsupported by any citation to the record. If the state trial judge had found as a matter of fact that Martin had probable cause to arrest for a weapons charge rather than a drug charge, the search would have been incident to arrest, not pursuant to the stop and frisk statute. If the state trial judge had made such a finding, he would also have had to determine whether Sibron had been seized by Martin before Martin developed his probable cause and whether the seizure was valid. Justice Black accused the majority of choosing "to draw inferences different from mine and those drawn by the courts below,"¹⁵⁹ but it appears that Justice Black

¹⁵⁷ *Sibron*, 392 U.S. at 65.

¹⁵⁸ *Id.* at 80 (Black, J., concurring and dissenting).

¹⁵⁹ *Id.* at 81.

offered a rationale for the officer's conduct that was not considered below and that could not be adopted without consideration of the seizure issue which he ignored.

The ultimate irony of *Sibron* in the Supreme Court is that Justice Black chastised the majority for acting upon its own findings and substituting itself for the lower state courts when the state itself represented that there had been error below and it was almost impossible to know exactly what the state courts had done. Moreover, there was no indication that any state court judge or prosecutors in the case had relied upon the reasoning which Justice Black settled upon in his opinion.

It is apparent that Chief Justice Warren worked hard to avoid deciding when police may forcibly detain a person for investigation, as opposed to when they may frisk a person. Despite the careful opinion of the New York Court of Appeals in *Peters*, the Chief Justice's opinion for the Supreme Court was that Officer Lasky had probable cause to arrest Peters when he first encountered him on the stairway and that the search was therefore a valid search incident to the arrest.¹⁶⁰ This reasoning appears to be strained. Had Lasky discovered nothing as a result of his conversation with Peters, and had the frisk uncovered nothing, it is doubtful that many courts would say that there was probable cause to arrest. Not surprisingly, Chief Justice Warren offered no clue as to what Peters would have been charged with prior to being discovered with the burglar tools.

Justice White joined the Court's opinion except for the reasoning about arrest. He joined the Court in affirming Peters's conviction "not because there was probable cause to arrest, a question I do not reach, but because there was probable cause to stop Peters for questioning and thus to frisk him for dangerous weapons."¹⁶¹

Justice Harlan disagreed in his opinion concurring in the result with the Court's analysis of probable cause, and persuasively argued that "if probable cause existed here, I find it difficult to see why a different rationale was necessary to support the stop and frisk in *Terry* and why States such as New York have had to devote so much thought to the constitutional problems of

¹⁶⁰ See *id.* at 66.

¹⁶¹ *Id.* at 69 (White, J., concurring). Justice White cited his concurring opinion in *Terry*. See *Terry v. Ohio*, 392 U.S. 1, 34 (1968) (White, J., concurring).

field interrogation."¹⁶² Justice Harlan would have affirmed the conviction "on the *Terry* ground that Officer Lasky had reasonable cause to make a forced stop."¹⁶³ Thus, Justice Harlan specifically addressed the forcible stop issue the Chief Justice struggled to avoid.

Justice Harlan agreed that it made little sense for the Court to pass upon the constitutionality of the New York statute on its face, but he also would not have ignored the statute. Since New York took pains to deal with the issue of on-the-street police work, Justice Harlan opined that the Court ought to indicate the level of New York's success. For Justice Harlan, "[t]he core of the New York statute is the permission to stop any person reasonably suspected of crime," and "[u]nder the decision in *Terry* a right to stop may indeed be premised on reasonable suspicion and does not require probable cause, and hence the New York formulation is to that extent constitutional."¹⁶⁴

Justice Harlan equated the terms reasonable cause and reasonable suspicion at times in his opinion and emphasized that reasonable suspicion can justify a stop when an incipient crime is being investigated whereas probable cause requires a degree of likelihood that a crime already has been committed.¹⁶⁵ He suggested that "where immediate action is obviously required, a police officer is justified in acting on rather less objectively articulable evidence than when there is more time for consideration of alternative courses of action."¹⁶⁶

IV. THE STATE OF THE LAW AFTER *TERRY*

A. *The Absence of a Clear Rule*

Although it is impossible to know for certain what any four or more justices of the Supreme Court were thinking in 1967, it appears reasonable to conclude that the Court noted probable jurisdiction in *Peters* and *Sibron* because the New York statute raised an important constitutional issue which the Court wanted to decide, and that the Court also granted review in *Terry* to compare the nonstatutory approach of Ohio to the statutory ap-

¹⁶² *Sibron*, 392 U.S. at 74 (Harlan, J., concurring).

¹⁶³ *Id.* at 77-78.

¹⁶⁴ *Id.* at 71.

¹⁶⁵ *See id.* at 78.

¹⁶⁶ *Id.*

proach of New York. Whatever the Court was thinking when it set the three cases for argument, at some point a majority decided that it wanted to avoid announcing a clear rule that would apply to all forcible police stops or seizures of a person without probable cause. Chief Justice Warren criticized the New York Court of Appeals in *Sibron* without knowing for sure what the basis of the court's decision was in that case, and rejected a confession of error by the state notwithstanding the lack of clarity in the record as the grounds for the decision below. The Chief Justice strained in *Peters* to turn an investigative stop into an arrest in order not to approve the application of the New York statute to the facts, even though Officer Lasky's actions were as reasonable and perhaps more necessary than the actions of Detective McFadden in *Terry*. In *Terry*, the Chief Justice worked hard to leap over the issue of whether, and on what basis, a police officer may forcibly stop a person to investigate in order to make the case seem like nothing more than an immediate frisk case, and stated the holding of the Court in the narrow terms explored in detail above.

Today, we readily refer to the *Terry* doctrine as a reasonable suspicion rule, but it was hardly clear that a majority of the Court approved such a rule in 1968. By the end of the 1967 term, the Court had no clear standard for investigative stops. It had, however, planted all the seeds for what the *Terry* doctrine would eventually become.

B. One More Case

A week to the day after announcing the opinions in *Terry*, *Sibron*, and *Peters*, the Court dismissed as improvidently granted the writ of certiorari in *Wainwright v. New Orleans*.¹⁶⁷ The case is interesting because it demonstrates that the Court had not yet grasped the possible significance of the opinions rendered the previous week.

Stephen Wainwright was a Tulane University law student in 1964 when he was observed by New Orleans police as fitting the description of a man wanted for murder. The police stopped their cruiser and detained Wainwright, apparently telling him why. The suspect whom the police sought had a tattoo on his left forearm with the words "born to raise hell." The police asked

¹⁶⁷ 392 U.S. 598 (1968).

Wainwright, who had no identification (apparently he had left it at home), to remove his jacket so that could examine his left forearm. Wainwright refused, although he did not disclose at the time that he was suffering from an unsightly skin ailment. Wainwright attempted three times to walk away from the police, twice before they placed him under arrest for vagrancy. Ultimately, Wainwright was convicted of resisting arrest and assault, but the conviction was overturned on appeal.

Chief Justice Warren dissented from the dismissal of the writ of certiorari and argued that the arrest was unlawful and the conviction could not stand. He offered one view of the facts of the case. Justice Douglas also dissented and offered another view, suggesting that the officers removed Wainwright to the police station solely to be able to determine whether he matched the tattoo.¹⁶⁸ Justice Douglas concluded that the police "seized" Wainwright to question him about the murder, and reasoned that "[t]he circumstances of this case show that the arrest was no more than arrest on suspicion, which of course was unconstitutional—at least prior to *Terry*—and robs the search of any color of legality."¹⁶⁹ Justice Douglas argued that the police had no right to "seize" Wainwright, and that the case pointed up the dangers of *Terry*.¹⁷⁰

It is significant that Chief Justice Warren did not even address the question of what police officers may do when they confront someone who matches the description of a murderer. May they detain him? May they question him? May they seek a physical identification by looking at his arm? For the Chief Justice it was clear that the arrest and search were illegal and the state courts "rejected possibly meritorious [defenses] on the erroneous premise that the search was lawful."¹⁷¹ But, Justice Fortas and Justice Marshall, who did not participate in *Terry*, were "not prepared to say that, regardless of the presence or absence of adequate cause for police action, the arrest or the attempt by the officers to search is unlawful . . . where the accosted person produces no identification, attempts three times to walk away, and refuses to dispel any doubt by showing that his forearm is

¹⁶⁸ See *id.* at 610 (Douglas, J., dissenting).

¹⁶⁹ *Id.* at 613 (citations omitted).

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 603 (Warren, C.J., dissenting).

not tattooed.”¹⁷²

Wainwright was a signal to the Court that the *Terry* opinion was only the first step in defining the permissible scope of forcible police encounters with citizens on the street. The Chief Justice deliberately avoided the issue of when a forcible stop for questioning may occur in his opinions in *Terry*, *Sibron* and *Peters*. When he addressed the *Wainwright* case a week after those decisions were announced, his confidence that the police had acted wrongly was not widely shared among the justices.

V. ADAMS V. WILLIAMS—THE NEXT STEP

A. The Facts

The Supreme Court of Connecticut stated the facts *State v. Williams*¹⁷³ as follows: At 2:15 a.m. on a Sunday morning, Sergeant John Connolly of the Bridgeport Police Department was patrolling alone in a high crime area when he was approached by a man he knew and regarded as trustworthy. This man told him that a person seated in a vehicle on the other side of the street was armed with a pistol at his waist and had narcotics in his possession. Sergeant Connolly approached the vehicle, tapped on the window and told the occupant, Robert Williams, to open the door. When Williams rolled down the window instead, Connolly reached into the car and removed a fully loaded pistol from the defendant's waistband. He then arrested the defendant. A subsequent search revealed that Williams had heroin on his person, a machete in the car under the front seat, and a second revolver in the trunk.

B. The Lower Courts

The Connecticut Supreme Court found that Connolly acted properly under *Terry*.¹⁷⁴ Williams sought federal habeas corpus relief which was denied in the District Court of Connecticut. A panel of the United States Court of Appeals for the Second Circuit affirmed the denial,¹⁷⁵ but the vote was 2-1 and the dissenting opinion of the distinguished jurist Henry Friendly proved in

¹⁷² *Id.* at 599 (Fortas, J., joined by Marshall, J., concurring).

¹⁷³ 249 A.2d 245, 246 (Conn. 1969), *cert. denied*, 395 U.S. 927 (1969).

¹⁷⁴ *See id.* at 247.

¹⁷⁵ *See Williams v. Adams*, 436 F.2d 30 (2d Cir. 1970), *rev'd on reh'g en banc per curiam*, 441 F.2d 30 (1971), *rev'd*, 407 U.S. 143 (1972).

the end to be persuasive to his fellow judges. The panel decision of the Court of Appeals was reversed by a rare en banc per curiam decision of the Court of Appeals.¹⁷⁶

Judge Friendly seemed to reason as follows: (1) Connecticut permits citizens to carry firearms, even concealed weapons, and does not authorize officers to routinely frisk for weapons; (2) Therefore, a tip that a person was carrying a firearm is not necessarily a tip about a criminal act or one that shows that crime is afoot; (3) An unsubstantiated tip that a person has narcotics does not give rise to reasonable suspicion; (4) If (1), (2), and (3) are correct, then an unsubstantiated tip that a person has a gun and narcotics still does not give rise to reasonable suspicion, since the gun remains potentially lawful and the narcotics tip remains uncorroborated; (5) There is a danger that police will focus on the gun, even in a state where it is lawful to carry it, to do a frisk which is a subterfuge for a narcotics search.¹⁷⁷

C. The Supreme Court

The Supreme Court reversed the Court of Appeals and reinstated the conviction of Williams in its first look at *Terry* since the case was decided.¹⁷⁸ Then Justice Rehnquist wrote for a majority of the Court that "[i]n *Terry* this Court recognized that 'a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest.'"¹⁷⁹ Justice Rehnquist added that "[a] brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time."¹⁸⁰ He also noted that *Terry* permitted an officer to protect himself against attack.¹⁸¹ He applied the *Terry* principles to the facts of this case and concluded that "Sgt. Connolly acted justifiably in responding to his informant's tip."¹⁸² The opinion rejected Williams's argument

¹⁷⁶ See *Williams v. Adams*, 441 F.2d 394 (2d Cir. 1971) (en banc) (per curiam), *rev'd*, 40 U.S. 143 (1972).

¹⁷⁷ See *Williams*, 436 F.2d at 37-38.

¹⁷⁸ See *Adams v. Williams*, 407 U.S. 143 (1972).

¹⁷⁹ *Id.* at 145 (citing *Terry v. Ohio*, 392 U.S. 1, 22 (1968)).

¹⁸⁰ *Id.* (citing *Terry*, 392 U.S. at 21-22).

¹⁸¹ See *id.*

¹⁸² *Id.*

that reasonable cause for a stop and frisk can only be based on an officer's direct observations rather than on information provided by others, and reasoned that some tips may be reliable and may form the basis for a stop and frisk while other tips may require further investigation before a forcible stop or a suspect would be authorized.¹⁸³

The *Williams* opinion more explicitly recognizes the power to forcibly stop for investigatory purposes than *Terry* did. It followed the lead of *Terry* regarding frisks by finding that Connolly acted properly in making a limited intrusion to protect his safety.

Three separate dissents were filed. Justice Douglas, joined by Justice Marshall, dissented on the ground that there was no basis to arrest Williams for possession of a gun when Connecticut permitted its citizens to carry concealed weapons.¹⁸⁴ Justice Brennan relied upon Circuit Judge Friendly's dissent from the panel decision,¹⁸⁵ and concluded that the tip did not give rise to reasonable cause to support the intrusion. Justice Marshall, joined by Justice Douglas, appeared to join Justice Rehnquist in concluding that *Terry*, which had largely ducked the investigatory stop issue, "explicitly recognized the concept of 'stop and frisk' and squarely held that police officers may, under appropriate circumstances, stop and frisk persons suspected of criminal activity even though there is less than probable cause for an arrest."¹⁸⁶ Justice Marshall emphasized that the facts were similar to *Terry* because the decision to frisk was made virtually immediately after the officer encountered the suspect, but distinguished *Williams* from *Terry* on the basis of the tipster's failure to explain how he came about any of his information.¹⁸⁷ Justice Marshall, like Justice Douglas, questioned whether the tip established that the suspect was armed and dangerous when the state permitted its citizens to carry weapons, concealed or otherwise.¹⁸⁸

¹⁸³ See *id.* at 147.

¹⁸⁴ See *id.* at 149-51 (Brennan, J., dissenting).

¹⁸⁵ See *Williams*, 436 F.2d at 38-39 (Friendly, J., dissenting).

¹⁸⁶ *Adams*, 407 U.S. at 153 (Marshall, J., dissenting).

¹⁸⁷ See *id.* at 155-59.

¹⁸⁸ See *id.* at 159-60. Justice Marshall also questioned whether Connolly had probable cause to arrest for possession of a gun without any information about whether it was possessed lawfully or unlawfully, and called "[a]ny implication that respondent's silence was some sort of a tacit admission of guilt . . . utterly absurd."

D. The Evolving Standard

Adams v. Williams did more than reiterate *Terry*. It seemed to bolster the "investigatory stop" part of stop and frisk and continue Chief Justice Warren's approach of taking a common sense approach to law enforcement. The Court was willing to permit Sergeant Connolly to consider the area in which the car was located, the time of the morning, the absence of any legitimate explanation for the car's presence, and his familiarity with the tipster in deciding that he should intervene and confront the suspect. The Court also reflected its understanding that no police officer could be expected to approach a suspect who is supposed to be armed and who may be involved with narcotics without checking for weapons.

Judge Friendly noted in his dissent from the panel decision that in his view the threshold issue a court must confront is whether an officer had the right to insist on an encounter, i.e., "to make a forcible stop."¹⁸⁹ Judge Friendly observed that "I do not read the Chief Justice's opinion as holding otherwise, although as Mr. Justice Harlan indicated, . . . the thought may not have been 'fully expressed.'"¹⁹⁰ Of course, the Chief Justice's *Terry* opinion did not hold otherwise; it avoided holding anything at all. But, in *Williams*, the Court as a whole addresses the threshold issue and the 6-3 split is whether Connolly should have taken the first step, or made a stop. With a little help from Judge Friendly's interpolation of the Harlan analysis into the Warren opinion, the Supreme Court in *Williams* made clear that a stop and frisk requires two justifications and that the Harlan analysis would become the legacy of *Terry*.¹⁹¹

VI. TRANSFORMATION COMPLETE

A. *Almeida-Sanchez v. United States*¹⁹²

Almeida-Sanchez, a Mexican citizen holding a valid United States work permit, was convicted of knowingly receiving, concealing and facilitating the transportation of a large quantity of

Id. at 160-61.

¹⁸⁹ *Williams*, 436 F.2d at 35 (quoting *Terry v. Ohio*, 392 U.S. 1, 32 (1968) (Harlan, J., concurring)).

¹⁹⁰ *Id.* at 35 n.2.

¹⁹¹ See *Adams*, 407 U.S. at 148.

¹⁹² 413 U.S. 266 (1973).

illegally imported marijuana. He contended that the search of his automobile that uncovered the marijuana was a violation of the Fourth Amendment.¹⁹³ The government did not dispute Almeida-Sanchez's claim that the Border Patrol had no search warrant, and that there was no probable cause of any kind for the stop of his car or the subsequent search.¹⁹⁴

Instead, the government claimed that it acted reasonably in an effort to detect illegal aliens.¹⁹⁵ Justice Stewart's opinion for the Court observed that the Border Patrol conducts three types of surveillance along inland roadways. First, it maintains permanent checkpoints at certain nodal intersections; next, temporary checkpoints are established from time to time at various places; and finally, there are roving patrols such as the one that stopped and searched Almeida-Sanchez's car.¹⁹⁶ The government argued that, in all of these operations, its agents are acting within the Constitution when they stop and search automobiles without a warrant, without probable cause to believe the cars contain aliens, and even without probable cause to believe the cars have made a border crossing.¹⁹⁷ The government relied upon § 287(a)(3) of the Immigration and Nationality Act,¹⁹⁸ which provided for warrantless searches of automobiles and other conveyances " 'within a reasonable distance from any external boundary of the United States,' as authorized by regulations to be promulgated by the Attorney General," and upon the Attorney General's regulation,¹⁹⁹ which "defines 'reasonable distance' as 'within 100 air miles from any external boundary of the United States.' "²⁰⁰

Justice Stewart's opinion stated that "not even the 'reasonable suspicion' found sufficient for a street detention and weapons search in *Terry v. Ohio* . . . and *Adams v. Williams*" was required.²⁰¹ Ultimately, the Court held, 5-4, that roving searches without probable cause were impermissible.²⁰² But, the decision had clearly referred to *Terry* and *Adams* as reasonable suspicion

¹⁹³ See *id.* at 267.

¹⁹⁴ See *id.* at 268.

¹⁹⁵ See *id.*

¹⁹⁶ See *id.*

¹⁹⁷ See *id.*

¹⁹⁸ Ch. 9, § 287, 66 Stat. 233 (1952) (codified at 8 U.S.C. § 1357(a)(3) (1994)).

¹⁹⁹ 8 C.F.R. § 287.1 (1998).

²⁰⁰ *Almeida-Sanchez*, 413 U.S. at 268.

²⁰¹ *Id.*

²⁰² See *id.* at 273-75.

cases, notwithstanding the failure of the author of either opinion to use a reasonable suspicion standard explicitly.

*B. United States v. Brignoni-Ponce*²⁰³

This case arose after *Almeida-Sanchez* and involved a Border Patrol claim that they could stop a car and question its occupants as part of its effort to thwart the illegal immigration of aliens. Justice Powell's opinion for the Court correctly noted that, in *Terry*, "the Court declined expressly to decide whether facts not amounting to probable cause could justify an 'investigative seizure' 'short of an arrest.'"²⁰⁴ Justice Powell also noted that the Court had "elaborated" on *Terry* in *Adams v. Williams*, "holding that a policeman was justified in approaching the respondent to investigate a tip that he was carrying narcotics and a gun."²⁰⁵

Putting the two cases together, Justice Powell concluded that they "establish that in appropriate circumstances the Fourth Amendment allows a properly limited 'search' or 'seizure' on facts that do not constitute probable cause to arrest or to search for contraband or evidence of crime."²⁰⁶ He reasoned that "[t]he limited searches and seizures in those cases were a valid method of protecting the public and preventing crime," and:

In this case as well, because of the importance of the governmental interest at stake, the minimal intrusion of a brief stop, and the absence of practical alternatives for policing the border, we hold that when an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke suspicion.²⁰⁷

Justice Powell relied upon *Terry* for the proposition that the stop and inquiry must be " 'reasonably related in scope to the justification for their initiation,' " so that an immigration officer "may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, but any further detention or search must be

²⁰³ 422 U.S. 873 (1975).

²⁰⁴ *Id.* at 880 (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968)).

²⁰⁵ *Id.* at 880-81.

²⁰⁶ *Id.* at 881.

²⁰⁷ *Id.*

based on consent or probable cause."²⁰⁸

The Court once again equated *Terry* with reasonable suspicion. Border search cases were the vehicle the Court used to elaborate upon *Terry*.

*C. New York v. Earl*²⁰⁹

In his dissent from the denial of certiorari in a case in which the New York Court of Appeals reversed a conviction,²¹⁰ Chief Justice Burger stated his understanding of *Terry*: "*Terry* establishes a two-pronged test for determining the propriety of this type of conduct: '[1] whether the officer's action was justified at its inception, and [2] whether it was reasonably related in scope to the circumstances which justified the interference in the first place.'"²¹¹ The Chief Justice equated justification at its inception with reasonable suspicion.²¹² He did not elaborate on the standard nor did he indicate that he felt it needed explanation.

*D. Ybarra v. Illinois*²¹³

In this case, Justice Stewart's opinion for the Court found unconstitutional an Illinois statute giving law enforcement the authority to detain and search all persons present when a search warrant is issued. Ybarra was a customer in a tavern when police arrived with a search warrant to search the tavern and the bartender. The police searched Ybarra and found narcotics. The Court found that all patrons of the tavern were cloaked with the constitutional protection of the Fourth Amendment and there was no probable cause to search them.²¹⁴ It rejected the state's argument that the search was a permissible frisk, reasoning that "[t]he *Terry* case created an exception to the requirement of probable cause, an exception whose 'narrow scope' this Court 'has been careful to maintain.'"²¹⁵ Justice Stewart emphasized

²⁰⁸ *Id.* at 881-82 (quoting *Terry*, 392 U.S. at 29).

²⁰⁹ 431 U.S. 943 (1977).

²¹⁰ See *People v. Earl*, 358 N.E.2d 1037 (N.Y. 1976) (mem.), cert. denied 431 U.S. 943 (1977).

²¹¹ *Earl*, 431 U.S. at 945-46 (Burger, C.J., dissenting from denial of certiorari) (quoting *Terry*, 392 U.S. at 20) (alterations in original).

²¹² See *id.* at 946.

²¹³ 444 U.S. 85 (1979).

²¹⁴ See *id.* at 91-92 (limiting the application of the search warrant to the place and persons specified in the warrant itself).

²¹⁵ *Id.* at 93 (quoting *Dunaway v. New York*, 442 U.S. 200, 210 (1979)).

that "[n]othing in *Terry* can be understood to allow a generalized 'cursory search for weapons' or indeed, any search whatever for anything but weapons."²¹⁶ As for the standard to be employed, Justice Stewart wrote that "[t]he 'narrow scope' of the *Terry* exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked, even though that person happens to be on premises where an authorized narcotics search is taking place."²¹⁷ Chief Justice Burger, Justice Blackmun and Justice Rehnquist dissented.

*E. Delaware v. Prouse*²¹⁸

Finally, in 1979, the Supreme Court held that the reasonable suspicion rule it had applied to roving border searches to limit stops of automobiles applied more generally to all automobile stops. In *Prouse*, Justice White framed the question as follows:

The question is whether it is an unreasonable seizure under the Fourth and Fourteenth Amendments to stop an automobile, being driven on a public highway, for the purpose of checking the driving license of the operator and the registration of the car, where there is neither probable cause to believe nor reasonable suspicion that the car is being driven contrary to the laws governing the operation of motor vehicles or that either the car or any of its occupants is subject to seizure or detention in connection with the violation of any other applicable law.²¹⁹

Justice White cited *United States v. Brignoni-Ponce*²²⁰ as having "analogized the roving-patrol stop to the on-the-street encounter addressed in *Terry v. Ohio*."²²¹ The Court rejected Delaware's argument that its interest in enforcing traffic laws and license and registration requirements justified a random stop without cause.²²²

Justice White wrote that "[t]o insist neither upon an appropriate factual basis for suspicion directed at a particular auto-

²¹⁶ *Id.* at 93-94.

²¹⁷ *Id.* at 94.

²¹⁸ 440 U.S. 648 (1979).

²¹⁹ *Id.* at 650.

²²⁰ 422 U.S. 873, 881 (1975). For a discussion of *Brignoni-Ponce*, see *supra* notes 203-08 and accompanying text.

²²¹ *Prouse*, 440 U.S. at 655.

²²² See *id.*

mobile nor upon some other substantial and objective standard or rule to govern the exercise of discretion 'would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches' ²²³ Of course, the quote is from *Terry*. Justice White explained how the imposition of a standard like reasonable suspicion protects against abuse of discretion by law enforcement officers:

When there is not probable cause to believe that a driver is violating any one of the multitude of applicable traffic and equipment regulations—or other articulable basis amounting to reasonable suspicion that the driver is unlicensed or his vehicle unregistered—we cannot conceive of any legitimate basis upon which a patrolman could decide that stopping a particular driver for a spot check would be more productive than stopping any other driver. This kind of standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent. ²²⁴

Justice White relied upon *Terry* for the proposition that just as "people are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks. Nor are they shorn of those interests when they step from the sidewalks into their automobiles." ²²⁵

Justice White concludes his opinion by stating the Court's holding as follows:

[E]xcept in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment. ²²⁶

²²³ *Id.* at 661 (quoting *Terry v. Ohio*, 392 U.S. 1, 22 (1968)).

²²⁴ *Id.* (citing *inter alia* *Almeida-Sanchez v. United States*, 413 U.S. 266, 270 (1973)) (footnote omitted).

²²⁵ *Id.* at 663.

²²⁶ *Id.* The Court left open the possibility that Delaware and other states might constrain the exercise of discretion in other ways, such as roadblocks at which all drivers are asked for licenses and registrations. *See id.*

*F. Dunaway v. New York*²²⁷ and *Brown v. Texas*²²⁸

Three months after announcing *Delaware v. Prouse*, the Court held in *Dunaway v. New York* that a police officer violated the Fourth Amendment when he removed defendant Dunaway to the station house without probable cause and interrogated him.²²⁹ Justice Brennan's opinion for the Court described *Terry* as the case that "for the first time recognized an exception to the requirement that Fourth Amendment seizures of persons must be based on probable cause," and as the case "[t]hat . . . involved a brief, on-the-spot stop on the street and a frisk for weapons, a situation that did not fit comfortably within the traditional concept of an 'arrest.'"²³⁰ According to Justice Brennan:

Terry departed from traditional Fourth Amendment analysis in two respects. First, it defined a special category of Fourth Amendment 'seizures' so substantially less intrusive than arrests that the general rule requiring probable cause to make Fourth Amendment 'seizures' reasonable could be replaced by a balancing test. Second, the application of this balancing test led the Court to approve this narrowly defined less intrusive seizure on grounds less rigorous than probable cause, but only for the purpose of a pat-down for weapons.²³¹

Thus, Justice Brennan described *Terry* as a case that involved both a stop and then a frisk.²³²

In *Brown*, Chief Justice Burger wrote for the Court as it held that officers "seized" Brown when they detained him for the purpose of requiring him to identify himself, and that they lacked reasonable suspicion to support their seizure.²³³ The Chief Justice cited *Dunaway*, *Terry*, *Brignoni-Ponce*, and *Prouse* in his opinion.²³⁴ He described the purport of these cases as follows:

A central concern in balancing these competing considerations in a variety of settings has been to assure that an

²²⁷ 442 U.S. 200 (1979).

²²⁸ 443 U.S. 47 (1979).

²²⁹ See *Dunaway*, 442 U.S. at 207.

²³⁰ *Id.* at 208-09.

²³¹ *Id.* at 209-10.

²³² Justice Brennan did observe that the *Terry* Court did not actually decide whether a person could be stopped and seized for purposes of interrogation. See *id.* at 210 n.12.

²³³ *Brown*, 443 U.S. at 50-52.

²³⁴ See *id.*

individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field. To this end, the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers.²³⁵

Chief Justice Burger reasoned that "[t]he Texas statute under which appellant was stopped and required to identify himself is designed to advance a weighty social objective in large metropolitan centers: prevention of crime," but his opinion goes on to hold that, "even assuming that purpose is served to some degree by stopping and demanding identification from an individual without any specific basis for believing he is involved in criminal activity, the guarantees of the Fourth Amendment do not allow it."²³⁶ The Court found that it was insufficient that an officer testified that the situation involving Brown "looked suspicious" when the officer could recall no facts supporting the conclusion.²³⁷

G. The State of the Law

By the end of the Court's 1978 Term, it had extended *Terry* to automobile stops generally, and had recognized that *Terry* established a reasonable suspicion standard for stops amounting to seizures and permitted a limited frisk for weapons when an officer reasonably had safety concerns. The Court never explicitly stated that, in adopting the reasonable suspicion standard, it was going beyond the holding of *Terry* and approving the standard that Chief Justice Warren had worked hard to avoid in his opinion. Reasonable suspicion was a metamorphosis of *Terry*. It occurred over time without complaint from any Justice.

Thus, the *Terry* rule that I regard as practically perfect had clearly been established in 1979. It is a rule that requires an officer making a forcible intrusion upon a suspect to have reasonable suspicion, as Justice Harlan proposed and Justice White seemed to accept in *Terry*; reasonable suspicion must be based upon specific articulable facts, as Chief Justice Warren insisted

²³⁵ *Id.* at 51 (citations omitted).

²³⁶ *Id.* at 52.

²³⁷ *Id.*

upon in *Terry*; and the reasonable suspicion must be that criminal activity has occurred, is occurring or is about to occur, as Justice Harlan articulated in *Terry*.

The Court had less occasion from 1968 to 1979 to develop the "frisk" rule first articulated in *Terry* and relied upon in *Adams v. Williams*.²³⁸ But, it consistently reiterated that the frisk permitted by *Terry* is a limited search permitted to protect public safety and is confined to weapons.

This developed notion of stop and frisk is what I hereinafter refer to as the *Terry* rule.

VII. THE PRACTICAL EFFECT OF *TERRY* STOPS

A. *Why Stop?*

The common sense of *Terry* is that law enforcement officers should not be required to wait to act until a crime is complete, whereby society suffers a criminal injury, if they have reasonable grounds to suspect that criminal activity is under way and the ability to establish quickly whether their suspicion is correct. Most *Terry* stops can be understood as "freezing the scene" so that an officer can make a determination as to whether probable cause to arrest or search exists, or whether some other permissible action should be taken. A *Terry* stop enables the police to ascertain whether what looks like criminal activity, actually is. As a result of *Terry*, officers are not compelled to make a Hobson's choice between waiting for suspicious activity to play out in terms of completed crimes, and prematurely intervening to arrest suspects who may be innocent. *Terry* permits an intermediate approach in which officers can avail themselves of reasonable suspicion, check out facts, and determine whether or not activity is criminal.

Of course, a *Terry* stop involves more than a police officer simply saying "freeze" or "halt" and then, once everyone has stopped, deciding whether or not the scene is criminal. In order to understand events, the officer may ask questions and use reasonable force to keep things under control until the stop ends either in arrest or in release of the persons stopped. This explains why the Supreme Court has indicated that the *Miranda v. Ari-*

²³⁸ 407 U.S. 143 (1972).

*zona*²³⁹ rule requiring warnings for suspects undergoing custodial interrogation does not apply to *Terry* stops.²⁴⁰ Since the purpose of a *Terry* stop is to enable an officer to gather sufficient information to know whether to arrest or release a suspect, the Court clearly does not want to impose roadblocks to reasonable information gathering.

B. Common Sense of Terry Stops

The Supreme Court appears to have agreed with many state courts that nothing in the Fourth Amendment absolutely bars law enforcement officers from acting until a crime is over and harm has occurred. The Court's approach represents common sense. It would require either clear language or an incredibly rich legislative history to convince most judges or any lay person that the Fourth Amendment was intended to prevent a police officer, who had reasonable suspicion that a suspect was carrying a bomb into the World Trade Center, from taking steps to determine whether his suspicion was correct, unless the suspect consented or the bomb was detonated so that a crime was complete. The facts of *Terry* are less compelling, of course. And the facts of *Adams v. Williams* are less compelling yet. But, the common sense remains the same. Law enforcement officers must have power to prevent crimes before they occur when they can do so with a brief and limited intrusion into a suspect's liberty.

C. Workability of the Terry Standard

The New York Court of Appeals claimed in *People v. Peters* that reasonable suspicion was a familiar term and that it would prove no more difficult to employ than probable cause.²⁴¹ Experience under *Terry* has proved that the Court of Appeals was correct.

It is interesting to observe that the same Congress that pro-

²³⁹ 384 U.S. 436 (1966).

²⁴⁰ See *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984) (holding that persons who are subject to ordinary traffic stops "are not 'in custody' for the purposes of *Miranda*").

²⁴¹ See *People v. Peters*, 219 N.E.2d 595, 599 (N.Y. 1966), *aff'd sub nom.*, *Sibron v. New York*, 392 U.S. 40 (1968) (stating that courts have given the terms "suspicion" and "reasonable suspicion" definite meaning, falling "somewhat below probable cause on the scale of absolute knowledge of criminal activity").

posed the Bill of Rights to the states had, two months earlier, enacted the first customs statute which "granted customs officials 'full power and authority' to enter and search 'any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed. . . .'"²⁴² Although the Supreme Court has considered the statute as evidence that the Fourth Amendment does not apply to border searches,²⁴³ the statute is better evidence from the dawning of the Nation that there has been an understanding that some intrusions involving searches can be justified on a reasonable suspicion standard. More importantly, the Supreme Court has never found it necessary to attempt to state probable cause in mathematical terms, and we have dealt with the term since the Fourth Amendment was adopted. Probable cause is a judgment call based upon the totality of the circumstances,²⁴⁴ and even though there is most always some probability of criminal activity, however small, associated with events, courts have been able to make probable cause a meaningful term. This does not mean that all judges agree in all cases. But there is a substantial body of agreement on when probable cause does or does not exist in many familiar circumstances.

This is also true of reasonable suspicion. Justice White concluded in *Peters* that there was probable cause to stop Peters for questioning.²⁴⁵ He apparently meant that there was a sufficient probability that crime was afoot that Peters could be stopped so that the officer could decide whether there was probable cause to arrest. Most courts applying *Terry* seem to use a similar analysis, often implicit, that *Terry* cause to stop exists when an officer has sufficient articulable facts to suspect that a crime may be occurring, may have occurred, or may be about to occur, and that a forcible police intrusion in the form of a stop will provide the officer with an opportunity to decide whether suspicion is confirmed or assuaged. Some courts speak of a reasonable possibility as opposed to a reasonable probability of criminal activity, and I

²⁴² *United States v. Ramsey*, 431 U.S. 606, 616 (1977) (quoting Act of July 31, 1789, ch. 5, § 24, 1 Stat. 29).

²⁴³ *See id.* at 617-18.

²⁴⁴ *See Illinois v. Gates*, 462 U.S. 213, 230-41 (1983). Even *Spinelli v. United States*, 393 U.S. 410, 419 (1969), which *Gates* overrules, recognized that probable cause requires only "the probability" of criminal activity, which the Court said was less than a *prima facie* showing.

²⁴⁵ *See Sibron*, 392 U.S. at 69 (White, J., concurring).

have joined in the suggestion that "[r]easonable suspicion can be usefully referred to as 'possible cause.'"²⁴⁶ The precise words are not as important as the relatively uniform approach which has remained constant since *Terry*.

Chief Justice Warren in *Terry* emphasized the importance of specific facts known to the police. Chief Justice Burger, in *United States v. Cortez*,²⁴⁷ carried forward this emphasis:

Courts have used a variety of terms to capture the elusive concept of what cause is sufficient to authorize police to stop a person. Terms like "articulable reasons" and "founded suspicion" are not self-defining; they fall short of providing clear guidance dispositive of the myriad factual situations that arise. But the essence of all that has been written is that the totality of the circumstances—the whole picture—must be taken into account. Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.

The idea that an assessment of the whole picture must yield a particularized suspicion contains two elements, each of which must be present before a stop is permissible. First, the assessment must be based upon all the circumstances. The analysis proceeds with various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and makes deductions—inferences and deductions that might well elude an untrained person.

The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.

The second element contained in the idea that an as-

²⁴⁶ SALTZBURG & CAPRA, *supra* note 39, at 193.

²⁴⁷ 449 U.S. 411 (1981).

assessment of the whole picture must yield a particularized suspicion is the concept that the process just described must raise a suspicion that the particular individual being stopped is engaged in wrongdoing. Chief Justice Warren, speaking for the Court in *Terry v. Ohio*, . . . said that, "[t]his demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence."²⁴⁸

The Supreme Court has also indicated that the quantum and reliability of required evidence for reasonable suspicion is less than that for probable cause. In *Alabama v. White*,²⁴⁹ Justice White's opinion for the Court observed that an informant's veracity and basis of knowledge, which were key under the probable cause standard of *Spinelli v. United States*,²⁵⁰ remained important under the probable cause standard adopted in *Illinois v. Gates*,²⁵¹ and "are also relevant in the reasonable-suspicion context, although allowance must be made in applying them for the lesser showing required to meet that standard."²⁵²

Justice White explained the different relationship between evidence amounting to probable cause and that amounting to reasonable suspicion as follows:

Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause. *Adams v. Williams* . . . demonstrates as much. We there assumed that the unverified tip from the known informant might not have been reliable enough to establish probable cause, but nevertheless found it sufficiently reliable to justify a *Terry* stop. Reasonable suspicion, like probable cause, is dependent upon both the content of information possessed by police and its degree of reliability. Both factors—quantity and quality—are considered in the "totality of the circumstances—the whole picture," that must be

²⁴⁸ *Id.* at 417-18 (quoting *Terry v. Ohio*, 392 U.S. 1, 21 n.18 (1968)) (alteration in original) (emphasis in original) (citations omitted).

²⁴⁹ 496 U.S. 325 (1990).

²⁵⁰ 393 U.S. 410, 415-19 (1969).

²⁵¹ 462 U.S. 213, 230-46 (1983).

²⁵² *White*, 496 U.S. at 328-29.

taken into account when evaluating whether there is reasonable suspicion. Thus, if a tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion than would be required if the tip were more reliable.²⁵³

There were three dissenters in *White*, and this serves as a reminder that the standard may be agreed upon while application of it will not always be unanimous. Nonetheless, reasonable suspicion has proved to be a workable yardstick for police and has assured that the police must have specific facts to justify any forcible encounters with the public.

The Supreme Court rejected an absolute time limit for *Terry* stops in *United States v. Sharpe*.²⁵⁴ But, the Court also indicated that a *Terry* stop is intended to be a brief detention, not a prolonged encounter. Thus, in *United States v. Place*,²⁵⁵ Justice O'Connor wrote for the Court that "the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion."²⁵⁶ She observed that the Court had never upheld a seizure for as long as 90 minutes and signaled that the Court was unhappy with police encounters that involved unreasonable delay.²⁵⁷

D. Extension of Terry to Property

Just two years after *Terry*, Justice Douglas, the sole *Terry* dissenter, wrote for a unanimous Court in *United States v. Van Leeuwen*²⁵⁸ as it held that officers, acting upon reasonable suspicion, properly detained a mailed package for more than a day while an investigation was made for purposes of developing probable cause and obtaining a warrant.²⁵⁹ Justice Douglas stated:

The rule of our decisions certainly is not that first-class mail can be detained 29 hours after mailing in order to obtain the search warrant needed for its inspec-

²⁵³ *Id.* at 330 (citations omitted) (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981)).

²⁵⁴ 470 U.S. 675 (1985).

²⁵⁵ 462 U.S. 696 (1983).

²⁵⁶ *Id.* at 709.

²⁵⁷ *See id.* at 709-10.

²⁵⁸ 397 U.S. 249 (1970).

²⁵⁹ *See id.*

tion . . . [but] on the facts of this case—the nature of the mailings, their suspicious character, the fact that there were two packages going to separate destinations, the unavoidable delay in contacting the more distant of the two destinations, the distance between Mt. Vernon and Seattle—a 29-hour delay between the mailings and the service of the warrant cannot be said to be “unreasonable” within the meaning of the Fourth Amendment.²⁶⁰

Justice Douglas added that “[d]etention for this limited time was, indeed, the prudent act rather than letting the packages enter the mails and then, in case the initial suspicions were confirmed, trying to locate them en route and enlisting the help of distant federal officials in serving the warrant.”²⁶¹

The Court in *United States v. Place*²⁶² accepted the “reasonableness under the Fourth Amendment of warrantless seizures of personal luggage from the custody of the owner on the basis of less than probable cause, for the purpose of pursuing a limited course of investigation, short of opening the luggage, that would quickly confirm or dispel the authorities’ suspicion.”²⁶³ Justice O’Connor’s opinion for the Court agreed with the government’s argument that, “where the authorities possess specific and articulable facts warranting a reasonable belief that a traveler’s luggage contains narcotics, the governmental interest in seizing the luggage briefly to pursue further investigation is substantial.”²⁶⁴ The Court concluded that the same interest in preventing crime that undergirded *Terry* supported a brief *Terry* seizure of luggage.²⁶⁵

As noted above, the Court found that the detention was excessive in *Place*. But, the basic idea is sound that the reasoning of *Terry* also supports a brief detention of property while a decision is made whether probable cause exists that would justify the property being searched without a warrant or seized while a warrant is sought.

²⁶⁰ *Id.* at 253.

²⁶¹ *Id.*

²⁶² 462 U.S. 696 (1983).

²⁶³ *Id.* at 702.

²⁶⁴ *Id.* at 703.

²⁶⁵ *See id.*

E. Long Range Benefit of Terry

The New York Court of Appeals warned in *People v. Peters*²⁶⁶ that, without a stop and frisk rule, there would be pressure on courts to water down the definition of probable cause so that police would be permitted to engage in the common sense law enforcement that *Terry* now permits.²⁶⁷ *Terry* does much to alleviate this pressure. Indeed, the development of the reasonable suspicion concept under *Terry* has clarified and sharpened the concept of probable cause.

*Florida v. Royer*²⁶⁸ illustrates the importance the Court has placed on distinguishing between reasonable suspicion and probable cause and on limiting the scope of a *Terry* stop. Royer was approached by plain-clothes detectives in the Miami International Airport, asked for identification, and questioned.²⁶⁹ Justice White's opinion for a plurality of justices²⁷⁰ noted that, when the detectives knew that Royer had paid cash for a one way ticket and placed a name tag on his luggage which was not his, they asked for and examined Royer's ticket and driver's license and discovered he was traveling under an assumed name. The opinion concluded that when they saw Royer become extremely nervous, the detectives had "adequate grounds for suspecting Royer of carrying drugs and for temporarily detaining him and his luggage while they attempted to verify or dispel their suspicions in a manner that did not exceed the limits of an investigative detention."²⁷¹ But, Justice White also concluded that when the detectives asked Royer to accompany them to a police room in the airport while they retained his ticket and seized his luggage, *Terry* and its progeny "did not justify the restraint to which

²⁶⁶ 219 N.E.2d 595 (N.Y. 1966), *aff'd sub nom* *Sibron v. New York*, 392 U.S. 40 (1968).

²⁶⁷ See *id.* at 600.

The attempt to apply a single standard of probable cause to all interferences—i.e., to treat a stop as an arrest and a frisk as a search—produces a standard either so strict that reasonable and necessary police work becomes unlawful or so diluted that the individual is not adequately protected.

Id.

²⁶⁸ 460 U.S. 491 (1983).

²⁶⁹ See *id.* at 494.

²⁷⁰ Justice White was joined by Justices Marshall, Powell and Stevens. See *id.* at 493.

²⁷¹ *Id.* at 502.

Royer was then subjected."²⁷² Thus, the plurality found that a consent to search his luggage was obtained in violation of the Fourth Amendment.²⁷³ *Royer* emphasizes the importance of focusing on: (1) the difference between *Terry* stops and prolonged detention, (2) the difference between probable cause and reasonable suspicion, and (3) the need to separate when a stop ends from when something more like an arrest begins.

The Supreme Court has not been alone in insisting that there is a genuine difference between probable cause and reasonable suspicion. Lower court cases like *United States v. Winsor*²⁷⁴ make this point as well. Officers chased suspected bank robbers fleeing from the bank into a hotel.²⁷⁵ The question was whether there was probable cause to search each of the rooms for the suspects. The court found that the probability of finding the bank robbers was too small to support probable cause, but that it did constitute reasonable suspicion:

The odds on discovering the suspect in the first room upon whose door the police knocked were high enough to amount to founded suspicion. The odds favoring discovery increase as rooms are searched. At some point, perhaps at the last two or three unsearched rooms, probable cause may be said to exist.²⁷⁶

Because there was only reasonable suspicion and not probable cause in *Winsor*, the Ninth Circuit, en banc, vacated a prior panel opinion that had upheld the conviction, and held that the search of the hotel room in which the suspects were actually found was illegal.²⁷⁷ A search for law enforcement purposes requires probable cause and cannot be justified under *Terry*.

Winsor also bolsters another proposition which the Supreme Court established in *Arizona v. Hicks*.²⁷⁸ In *Hicks*, police lawfully entered premises from which a weapon had been fired and "noticed two sets of expensive stereo components, which seemed

²⁷² *Id.* at 503.

²⁷³ *See id.* at 507-08.

²⁷⁴ 846 F.2d 1569 (9th Cir. 1988) (en banc).

²⁷⁵ *See id.* at 1571.

²⁷⁶ *United States v. Winsor*, 816 F.2d 1394, 1398 (9th Cir.), *reh'g granted and opinion withdrawn en banc*, 822 F.2d 1466 (9th Cir. 1987), and *vacated en banc*, 846 F.2d 1569 (9th Cir. 1988).

²⁷⁷ *See id.* at 1398.

²⁷⁸ 480 U.S. 321 (1987).

out of place in the squalid . . . apartment.”²⁷⁹ Suspecting that the components were stolen, one officer moved a turntable in order to read its serial number. This led to information that the turntable had been taken in an armed robbery.²⁸⁰ The State did not argue that probable cause existed to move the turntable, but rather that the movement and inspection was a “cursory” search that was supported by reasonable suspicion.²⁸¹ Justice Scalia, writing for the Court, rejected this argument and held that probable cause was required for the search. He declared that “[a] search is a search, even if it happens to disclose nothing but the bottom of a turntable.”²⁸² He concluded that “[w]e are unwilling to send police and judges into a new thicket of Fourth Amendment law, to seek a creature of uncertain description that is neither a ‘plain view’ inspection nor yet a ‘full-blown search.’ Nothing in the prior opinions of this Court supports such a distinction”²⁸³

In *Winsor*, the Winsors argued that under *Hicks*, the police conducted a search of their room when they knocked on the door, commanded that it be opened, and looked inside.²⁸⁴ The government argued that the officers had not conducted a full-blown search for evidence, but rather a cursory inspection requiring only reasonable suspicion.²⁸⁵ The Court of Appeals held that the evidence the officers discovered when the door opened (and all evidence found in the room thereafter) was illegally obtained, and stated that: “[W]e refuse the government’s invitation to decide this case by balancing the competing interests at stake. Instead, we adhere to the bright-line rule that *Hicks* appears to have announced: The Fourth Amendment prohibits searches of dwellings without probable cause.”²⁸⁶

These cases illustrate the point that the adoption of a reasonable suspicion standard has sharpened the judicial view of probable cause. These cases illustrate something else too, namely that *Terry* and its progeny have also worked to strengthen the distinction between searches and the limited

²⁷⁹ *Id.* at 323.

²⁸⁰ *See id.*

²⁸¹ *Id.* at 328.

²⁸² *Id.* at 325.

²⁸³ *Id.* at 328-29.

²⁸⁴ *See United States v. Winsor*, 846 F.2d 1569, 1572 (9th Cir. 1988).

²⁸⁵ *See id.*

²⁸⁶ *Id.* at 1579.

forms of intrusion that *Terry* originally approved.

Terry also has emphasized the importance of developing specific, articulable facts in investigations and of controlling police discretion. The stop and frisk rule permits the police to engage in what most people regard as reasonable and essential law enforcement activity but requires them to pay attention to all of the circumstances they confront and to articulate a reason for their actions that may be judicially reviewed.

Chief Justice Warren recognized in *Terry* that no rule would protect the public against police activity that was not intended to gather evidence or prosecute individuals.²⁸⁷ Police officers who want to make a show of force or to harass individuals will not be prevented from acting by *Terry*.²⁸⁸ But, the absence of a stop and frisk rule would not stop them either. The presence of a stop and frisk rule makes the decision to arrest prematurely less defensible than it would be without the rule; it serves as a public recognition of the split-second judgment calls that police officers make on the street each day.

VIII. THE *TERRY* FRISK

A. *The Terry Requirement for a Frisk*

Chief Justice Warren indicated in *Terry* that an officer who is justified in believing that the person whose suspicious behavior he is investigating is armed and dangerous may conduct a frisk of the suspect for weapons.²⁸⁹ Justice Harlan argued, in his concurring opinion in *Terry*, that the right to frisk must be "immediate and automatic" if the reason for a stop is to investigate an articulable suspicion of a crime of violence,²⁹⁰ but he added in his opinion, concurring in the result in *Sibron*, that "although I think that, as in *Terry*, the right to frisk is automatic when an officer lawfully stops a person suspected of a crime whose nature creates a substantial likelihood that he is armed, it is not clear that suspected possession of narcotics falls into this category," and "[i]f the nature of the suspected offense creates no reasonable apprehension for the officer's safety, I would not

²⁸⁷ See *Terry v. Ohio*, 392 U.S. 1, 14 (1968).

²⁸⁸ See *id.* at 14-15.

²⁸⁹ See *id.* at 27.

²⁹⁰ *Id.* at 33 (Harlan, J., concurring).

permit him to frisk unless other circumstances did so.”²⁹¹

B. The Shift Toward Reasonable Suspicion

None of the justices in *Terry* argued that a reasonable suspicion rule should govern frisks. Yet, just as post-*Terry* cases adopted a reasonable suspicion standard for stops, these cases adopted the same standard for frisks without asking whether the same standard was warranted. In *Ybarra v. Illinois*,²⁹² for example, the Court reviewed the execution of a search warrant by police who had been told that the bartender at a small tavern had drugs on his person and behind the bar, and that drugs would be sold.²⁹³ The police, who executed the warrant, frisked Ybarra, who was standing in front of the bar when they arrived, and all the other customers at the tavern.²⁹⁴ The facts—especially the failure to remove the drugs pursuant to the first frisk and the conducting of a second frisk of Ybarra²⁹⁵—suggest that police may have been turning the search warrant for the bar and bartender into a search of all customers, but the issue before the Court was whether a stop and frisk of Ybarra was justified.

Justice Stewart’s opinion for the Court describes Ybarra as posing no special threat:

When the police entered the Aurora Tap Tavern on March 1, 1976, the lighting was sufficient for them to observe the customers. Upon seeing Ybarra, they neither recognized him as a person with a criminal history nor had any particular reason to believe that he might be inclined to assault them. Moreover, as Police Agent Johnson later testified, Ybarra, whose hands were empty, gave no indication of possessing a weapon, made no gestures or other actions indicative of an intent to commit an assault, and acted generally in a manner that was not threatening. At the suppression hearing, the most Agent Johnson could point to was that Ybarra was wearing a 3/4-length lumber jacket, clothing which the State admits could be expected on almost any tavern patron in Illinois in early March. In short, the State is unable to articulate any specific fact that would have justified a police officer at

²⁹¹ *Sibron v. New York*, 392 U.S. 40, 74 (1968) (Harlan, J., concurring).

²⁹² 444 U.S. 85 (1979).

²⁹³ *See id.* at 88.

²⁹⁴ *See id.*

²⁹⁵ *See id.* at 88-89.

the scene in even suspecting that Ybarra was armed and dangerous.²⁹⁶

As noted above, Justice Stewart interpreted *Terry*, upon which the State relied, only to permit "a law enforcement officer, for his own protection and safety, . . . [to] conduct a patdown to find weapons that he reasonably believes or suspects are then in the possession of the person he has accosted," and "not [to] permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked, even though that person happens to be on premises where an authorized narcotics search is taking place."²⁹⁷

Chief Justice Burger, joined by Justices Blackmun and Rehnquist, dissented.²⁹⁸ The Chief Justice observed that he also agreed with Justice Rehnquist's separate dissent, and argued that "[t]he Court would require a particularized and individualized suspicion that a person is armed and dangerous as a condition to a *Terry* search," and "[t]his goes beyond the rationale of *Terry* and overlooks the practicalities of a situation which no doubt often confronts officers executing a valid search warrant."²⁹⁹

Justice Rehnquist, joined by the Chief Justice and Justice Blackmun agreed.³⁰⁰ He reasoned as follows:

Viewed sequentially, the actions of the police in this case satisfy the scope/justification test of reasonableness established by the first clause of the Fourth Amendment as interpreted in *Terry*. The police entered the Aurora Tap pursuant to the warrant and found themselves confronting a dozen people, all standing or sitting at the bar, the suspected location of the contraband. Because the police were aware that heroin was being offered for sale in the tavern, it was quite reasonable to assume that any one or more of the persons at the bar could have been involved in drug trafficking. This assumption, by itself, might not have justified a full-scale search of all the individuals in the tavern. Nevertheless, the police also were quite conscious of the possibility that one or more of the patrons

²⁹⁶ *Id.* at 93.

²⁹⁷ *Id.* at 93-94.

²⁹⁸ *See id.* at 96 (Burger, J., dissenting).

²⁹⁹ *Id.* at 97.

³⁰⁰ *See id.* at 98 (Rehnquist, J., dissenting) (quoting *United States v. Oates*, 560 F.2d 45, 62 (2d Cir. 1977)).

could be armed in preparation for just such an intrusion. In the narcotics business, "firearms are as much "tools of the trade" as are most commonly recognized articles of narcotics paraphernalia." The potential danger to the police executing the warrant and to innocent individuals in this dimly lit tavern cannot be minimized. By conducting an immediate frisk of those persons at the bar, the police eliminated this danger and "froze" the area in preparation for the search of the premises.³⁰¹

Since *Ybarra*, the Court has insisted upon reasonable suspicion as the requirement for self-protective police conduct. In *Michigan v. Long*,³⁰² the Court approved a *Terry* "frisk" that involved an officer's flashing a light into Long's car to see whether it might contain weapons. Justice O'Connor's opinion for the Court reasoned that *Terry* permits a limited examination of an area from which a person might gain immediate control of a weapon. Justice O'Connor wrote that:

[T]he search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on "specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant" the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons.³⁰³

In *Maryland v. Buie*,³⁰⁴ the Court considered the legality of a "protective sweep," a quick and limited search of premises incident to arrest for the purpose of protecting the safety of police. The Court relied upon both *Terry* and *Long* in Justice White's opinion:

The ingredients to apply the balance struck in *Terry* and *Long* are present in this case. Possessing an arrest warrant and probable cause to believe Buie was in his home, the officers were entitled to enter and to search anywhere in the house in which Buie might be found. Once he was found, however, the search for him was over. . . . In *Terry* and *Long* we were concerned with the immediate interest of the police officers in taking steps to assure themselves

³⁰¹ *Id.* at 106-07.

³⁰² 463 U.S. 1032 (1983).

³⁰³ *Id.* at 1049-50 (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)).

³⁰⁴ 494 U.S. 325 (1990).

that the persons with whom they were dealing were not armed with, or able to gain immediate control of, a weapon that could unexpectedly and fatally be used against them. In the instant case, there is an analogous interest.³⁰⁵

The Court has broadened *Terry* in terms of the geographical scope of a *Terry* frisk,³⁰⁶ but it has insisted that reasonable suspicion is required to support any frisk or its equivalent. As a result, reasonable suspicion has become the overarching standard for all actions taken under *Terry*, both stops and frisks, or seizures and searches.

C. The Practical Problem

One problem with reasonable suspicion as applied to frisks is that it assumes that the police have the same ability to gather information relating to a frisk as to a stop, and this assumption almost surely is false. The greater problem is that the reasonable suspicion rule leads to absurd results.

This becomes evident by comparing the facts of *Pennsylvania v. Mimms*³⁰⁷ with those of *Ybarra*. In *Mimms*, police officers stopped a car with an expired license plate. During the stop to issue a traffic summons, one officer ordered Mimms from the car.³⁰⁸ The Supreme Court held that, since the car was properly stopped and thus a valid seizure had occurred, the officer had an automatic right to order the driver out of the car.³⁰⁹ Even though the officer had no particularized reason to suspect that Mimms was a danger, the Court found that the state had a strong interest in protecting its officers from assault and that this interest outweighed the intrusion of having Mimms outside the car where the officer could see him.³¹⁰ Although the Court did not say so, one of the arguments for the *Mimms* result is that it encourages officers to use citations rather than to arrest people for

³⁰⁵ *Id.* at 332-33.

³⁰⁶ This expansion has not been without criticism. Justice Brennan, joined by Justices Marshall and Justice Stevens, dissented in *Long*. Justice Brennan, joined by Justice Marshall, also dissented in *Buie*; see also David A. Harris, *Frisking Every Suspect: The Withering of Terry*, 28 U.C. DAVIS L. REV. 1, 5 (1994) (arguing that lower courts are increasingly allowing frisks even where there appears to be little danger to the police officers).

³⁰⁷ 434 U.S. 106 (1977) (per curiam).

³⁰⁸ See *id.* at 107.

³⁰⁹ See *id.* at 111.

³¹⁰ See *id.*

minor offenses in order to be certain that they can protect themselves from potential harm by making a search incident to an arrest.

In *Ybarra*, Justice Rehnquist described why police executing a search warrant for drugs in a small tavern, with a small crowd present, might face danger.³¹¹ Whatever danger officers face in making routine traffic stops, it must pale before the danger of executing search warrants in drug cases. The connection between weapons and drugs is underscored daily in state and federal courts. The majority in *Ybarra* failed completely to tell the police what they were supposed to do if someone in the bar turned his back on the police, reached into a pocket, began to move around outside the sight of the officers, or did anything else that would fall short of reasonable suspicion but would scare any officer who had any sense. Had no customers been present when the officers arrived, arguably they could have prevented entrance while they executed their warrant. But, they could not know who would be on the scene when they arrived. Once they were present, they had to make a judgment about danger. They made the right judgment from a safety perspective, although they may also have been seeking to expand *Terry* into a drug search at the time, and the Supreme Court failed to pay sufficient attention to the real danger confronting the officers.

The reality is that officers who must decide whether to make a stop may have to make a quick decision. Officers who must decide whether to frisk sometimes may have to make an even quicker decision, and on less information than they have relating to the stop.

D. A Proposal

Justice Harlan had it right in his concurring opinion in *Terry* and in his concurring opinion in *Peters*: The right to frisk must be "immediate and automatic" if the reason for a stop is to investigate an articulable suspicion of a crime of violence,³¹² however, "[i]f the nature of the suspected offense creates no reasonable apprehension for the officer's safety, I would not permit him to frisk unless other circumstances did so."³¹³ An officer who

³¹¹ See *Ybarra v. Illinois*, 444 U.S. 85, 106-07 (1979) (Rehnquist, J., dissenting).

³¹² *Terry v. Ohio*, 392 U.S. 1, 33 (1968) (Harlan, J., concurring).

³¹³ *Sibron v. New York*, 392 U.S. 40, 74 (Harlan, J., concurring).

stops someone suspected of a crime of violence is dealing with a person who is by definition sufficiently dangerous that a frisk is always warranted. This is not to say that all suspects in all crimes of violence carry weapons or that all actually are dangerous. It is only to say that a reasonable suspicion standard is satisfied in this instance.

Recognition of the automatic nature of the frisk is preferable than pretending that it is reasonable to individualize decisionmaking in these circumstances. Justice Harlan's approach is more candid than the Supreme Court's analysis in *Richards v. Wisconsin*,³¹⁴ where the Court invalidated a Wisconsin Supreme Court rule that police officers are never required to knock and announce their presence when executing a search warrant in a felony drug investigation.³¹⁵ The Wisconsin Supreme Court understood that drugs and firearms are so closely intertwined in so many situations that there always will be "reasonable suspicion,"³¹⁶ which is the standard that the Court imposed to justify the failure to knock and announce.³¹⁷

The Supreme Court in *Richards* rejected the notion that police officers executing a search warrant in a case involving felonious drug trafficking may always execute the warrant without knocking and announcing their presence.³¹⁸ Justice Stevens's opinion for the Court reasoned that "not every drug investigation will pose these risks [of danger to the officer or destruction of evidence] to a substantial degree," since "a search could be conducted at a time when the only individuals present in a residence have no connection with the drug activity and thus will be unlikely to threaten officers or destroy evidence."³¹⁹ Justice Stevens also offered the example where "the police could know that the drugs being searched for were of a type or in a location that made them impossible to destroy quickly."³²⁰ Thus, Justice Stevens concluded that reasonable suspicion was required to justify dispensing with the knock and announce rule. In referring to the reasonable suspicion standard, he wrote that "[t]his showing is not high, but the police should be required to make it when-

³¹⁴ 117 S. Ct. 1416 (1997).

³¹⁵ See *id.* at 1422.

³¹⁶ *Id.* at 1420.

³¹⁷ See *id.* at 1421-22.

³¹⁸ See *id.* at 1422.

³¹⁹ *Id.* at 1421.

³²⁰ *Id.*

ever the reasonableness of a no-knock entry is challenged.”³²¹

The problem with the analysis is that reasonable suspicion is a demanding standard and does require specific, articulable facts in the context of a stop. To suggest that it is not demanding in the context of a “search” threatens to water down the standard. What the Court may well have meant to do was to agree with the Wisconsin Supreme Court that felony drug dealing is usually sufficiently dangerous that knocking and announcing while executing a warrant is unnecessary,³²² but to leave open the possibility that when the police have specific, articulable facts that would lead them to believe that there is no danger they must knock and announce. This would amount to a presumption that sufficient danger exists when a search warrant is executed in a felony drug case to dispense with the knock and announce requirement but would permit specific facts to rebut the presumption. Such a presumption would make a good deal of sense.

It is relatively easy to argue that a frisk should be automatic when officers are investigating a violent crime. The harder question is what “other circumstances” in Justice Harlan’s parlance should justify self-protective activity like a frisk or a protective search. Four sets of circumstances would seem to justify self-protection.

The first set is easy. It is any set of circumstances in which an officer does have reasonable suspicion that a particular person is armed and dangerous. This satisfies *Ybarra* and *Buie* and is readily defensible.

The second set of circumstances arises whenever police take action against an individual—arresting or executing a search warrant, for example—who they reasonably suspect is involved with others in (a) crimes of violence, or crimes with a high likelihood that individuals will be armed, and (b) at the time and place the police take their action they are unable to determine whether others are actually present, and (c) their action is limited to assuring that others who pose a danger are either not present or present and accounted for. Thus, in the *Buie* context, police will not have to pretend that they were able to make a reasonable suspicion judgment based upon *Buie*’s actions or their

³²¹ *Id.* at 1422.

³²² See *State v. Richards*, 549 N.W.2d 218, 227 (Wis. 1996), *aff’d*, 117 S. Ct. 1416 (1997).

observations at the scene of Buie's arrest; instead, they will be able to make their judgment on the reasonable apprehension of danger that exists when a person is reasonably suspected of involvement in criminal activity with others who may be dangerous and the others are unaccounted for when the police act. Applying this rule, police who arrest a suspect on the street would not be able to do a protective sweep of the suspect's house, because the danger of harm to the officers would not exist.

The third set of circumstances arises when police make a stop under circumstances that deny them the information usually available and thus make it impossible for them to make a reasonable judgment about danger. For example, a police officer who makes a stop in a poorly lit place at night and is dealing with a suspect who is wearing baggy clothing that could conceal a weapon. When no officer can be reasonably certain that a person is not dangerous, and the circumstances—one on one contact, darkness, and the size of a suspect, for example—indicate that danger might be present, an officer should be able to make a frisk. An officer should not be denied the right to self-protection simply because the conditions surrounding the stop make it impossible to make a reasoned determination about danger.

The fourth set of circumstances arises when police encounter a large group of individuals—in circumstances like *Ybarra*—in which one or more might well be associated with the crime the police are investigating, and it is impractical for the police to carry out their duties and simultaneously assure their safety without the benefit of a frisk. When several officers appear at a place to execute a search warrant and find one person present, the need to frisk that person may not arise. An officer can pay careful attention and make an individualized judgment about the person. When the same officers appear and confront a dozen people, the opportunity for individualized judgment diminishes and the danger increases.

IX. EXTENSION OF REASONABLE SUSPICION TO OTHER SEARCHES

As I have noted, reasonable suspicion is a defensible and workable standard when applied to *Terry* stops. It is less clear, however, whether the adoption of the reasonable suspicion standard to govern pure searches is either necessary or defensible.

In *New Jersey v. T.L.O.*,³²³ the Supreme Court rejected the State's argument that students have no reasonable expectation of privacy when they attend public schools.³²⁴ Although the Court recognized the need for schools to maintain discipline, Justice White wrote for the Court that "[w]e are not yet ready to hold that the schools and the prisons need be equated for purposes of the Fourth Amendment."³²⁵ His opinion also rejected the state's suggestion that any privacy interest in personal property could be maintained simply by leaving the property at home.³²⁶ The opinion concluded that "schoolchildren may find it necessary to carry with them a variety of legitimate, noncontraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them onto school grounds."³²⁷ The Court held in *T.L.O.* that the school official's search of a student's handbag was reasonable because the searching official had reasonable suspicion that the student had cigarettes in her bag.³²⁸

T.L.O. involved a true search that ordinarily would have required probable cause and a warrant. The Court chose to adopt reasonable suspicion as the standard for school searches, however, using a balancing test. Justice White wrote:

Ordinarily, a search—even one that may permissibly be carried out without a warrant—must be based upon "probable cause" to believe that a violation of the law has occurred. See, e.g., *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973); *Sibron v. New York*, 392 U.S. 40 (1968). However, "probable cause" is not an irreducible requirement of a valid search. The fundamental command of the Fourth Amendment is that searches and seizures be reasonable, and although "both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search, . . . in certain limited circumstances neither is required." *Almeida-Sanchez v. United States*, *supra*, 413 U.S., at 277 (Powell, J., concurring). Thus, we have in a number of cases recognized the legality of searches and seizures based on suspicions that, al-

³²³ 469 U.S. 325 (1985).

³²⁴ See *id.* at 335-37.

³²⁵ *Id.* at 338-39.

³²⁶ See *id.* at 339.

³²⁷ *Id.* at 339.

³²⁸ See *id.* at 346.

though "reasonable," do not rise to the level of probable cause. See, e.g., *Terry v. Ohio*, 392 U.S. 1 (1968); *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975); *Delaware v. Prouse*, 440 U.S. 648, 654-655, (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); cf. *Camara v. Municipal Court*, [387 U.S. 523, 534-39 (1967)].³²⁹

I left the citations in the above quotation, because all involve *Terry* stops, except *Camara* which requires probable cause, albeit a different kind of probable cause. The fact is that the necessity of on the spot decisionmaking is often not present in schools, and the balance the Court struck in *T.L.O.* is not justified on the basis of necessity relied upon by *Terry*. Moreover, the search in *T.L.O.* was for evidence, not for self-protection, and has nothing whatsoever to do with the rationale for *Terry*.

The same point may be made with respect to *Griffin v. Wisconsin*.³³⁰ There, the Court addressed the question whether the Fourth Amendment envisions a warrant which is not based upon particularized probable cause. Griffin, a probationer, challenged the search of his home by his probation officer. One argument in the case was that, even if probable cause was not required for the search of a probationer's home (due to a probationer's diminished expectation of privacy and the state's administrative interest in regulating a probationer), the Court should nonetheless require a warrant to be obtained. Justice Scalia, writing for the Court, contended that the Fourth Amendment could not be read to provide for such a warrant. He reasoned that a warrant based on something other than probable cause would violate the specific language in the Fourth Amendment that "no warrant shall issue, but upon probable cause."³³¹ He distinguished *Camara* as a case where the Court "arguably came to permit an exception to that prescription for administrative search warrants, which may but do not necessarily have to be issued by courts."³³² Justice Scalia emphasized that the general rule for judicial search warrants is that they can only be issued upon particularized probable cause. Thus, the Court refused to accept the solution of a warrant based on less than probable cause as a means of balancing state and individual interests. It held that a probation offi-

³²⁹ *Id.* at 340-41.

³³⁰ 483 U.S. 868 (1987).

³³¹ U.S. CONST. amend. IV.

³³² *Griffin*, 483 U.S. at 877.

cer can conduct a warrantless search of a probationer's house, upon reasonable suspicion of a probation violation.

Justice Scalia reasoned:

[I]t is both unrealistic and destructive of the whole object of the continuing probation relationship to insist upon the same degree of demonstrable reliability of particular items of supporting data, and upon the same degree of certainty of violation, as is required in other contexts. In some cases—especially those involving drugs or illegal weapons—the probation agency must be able to act based upon a lesser degree of certainty than the Fourth Amendment would otherwise require in order to intervene before a probationer does damage to himself or society. The agency, moreover, must be able to proceed on the basis of its entire experience with the probationer, and to assess probabilities in the light of its knowledge of his life, character, and circumstances.

To allow adequate play for such factors, we think it reasonable to permit information provided by a police officer, whether or not on the basis of firsthand knowledge, to support a probationer search. The same conclusion is suggested by the fact that the police may be unwilling to disclose their confidential sources to probation personnel. For the same reason, and also because it is the very assumption of the institution of probation that the probationer is in need of rehabilitation and is more likely than the ordinary citizen to violate the law, we think it enough if the information provided indicates, as it did here, only the likelihood ("had or might have had guns") of facts justifying the search.³³³

Whatever the merits of the reasoning, it is a far cry from the justification for using a reasonable suspicion standard in *Terry* situations. The decision whether to conduct a probationer search often need not be hurried, and if there is a rush, often *Terry* itself will apply. The argument that police may be reluctant to reveal their confidential sources to probation personnel sheds no light on whether a probable cause or reasonable suspicion standard should be adopted, since both require articulable facts and both require some judgment as to the reliability of sources. Moreover, the search in *Griffin* is not limited to self-protection as

³³³ *Id.* at 879-80 (footnote omitted).

was the search for weapons in *Terry*.

Thus, it is easy to defend *Terry* as applied to police investigations of crime and to applaud the reasonable suspicion standard as applied to stops without supporting a general balancing approach that permits probable cause to give way to reasonable suspicion any time the Court says it should. The rationale for a rule of necessity is not easily extended to justify rules of convenience.

X. CONCLUSION

Terry's stop and frisk rule as developed over the past 30 years has evolved to a practically ideal approach for governing law enforcement efforts to deal with a range of potentially criminal conduct without unnecessarily interfering with the liberty of ordinary people. The New York Court of Appeals's prediction in *Peters* that reasonable suspicion would prove to be as workable as probable cause as a standard to govern police behavior has turned out to be accurate. Because of *Terry* and its progeny, law enforcement officers can act before crime occurs to protect society, and they can do so without compromising the probable cause standard that governs arrests and warrants.

The frisk aspect of *Terry* has proved to be more problematic. The language of *Terry* avoided any reasonable suspicion requirement. Of course, *Terry* avoided this standard for both stops and frisks. Over time, we have learned that reasonable suspicion is a standard that works for stops, but one that is overly demanding and insensitive to the range of situations in which law enforcement officers may find themselves reasonably fearful for their safety. Reasonable suspicion that a suspect is armed and dangerous is a solid reason for permitting a frisk, but it is not the only reason. If the Supreme Court pays more careful attention to the arguments for permitting frisks or related self-protective measures in future cases, the *Terry* rule will become even more practically perfect than it presently is. The rule has stood the test of time, but with a little refinement, it promises to stand the test of the future.